Civil Proceedings

CHAPTER 3

Part I—Pleadings, Parties, and Commencement of Action (MCR Subchapters 2.000 and 2.200)

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Part I—Pleadings, Parties, and Commencement of Action (MCR Subchapters 2.000–2.200)

3.1 Jurisdiction and Venue

A. In General

1. Definition

The authority of the court to hear and to decide the case. *Grubb Creek Action Comm v Shiawassee County Drain Comm'r*, 218 Mich App 665, 668 (1996).*

*See the next section for a comparison of the jurisdiction of each court.

2. Two Components

There must be jurisdiction with regard to both the parties and the subject matter. *Sovereign v Sovereign,* 354 Mich 65, 71 (1958).

3. Effect

Subject matter jurisdiction is determined only by the allegations in the complaint. *Grubb Creek Action Comm v Shiawassee County Drain Comm'r*, 218 Mich App 665, 668 (1996).

Lack of subject matter jurisdiction is not waived by failure to raise it in pleadings. MCR 2.111(F)(2). Lack of subject matter jurisdiction may be raised at any time. Parties cannot confer jurisdiction by their conduct or action, nor can they waive the defense by not raising it. *Paulson v Sec'y of State,* 154 Mich App 626, 630-631 (1986); *Farmers & Merchants Bank v Rabideau,* 131 Mich App 302, 306 (1983); *Stamadianos v Stamadianos*, 425 Mich 1 (1986).

Lack of jurisdiction over parties is waived if not raised in responsive pleading or first motion, whichever is filed first. MCR 2.111(F)(2) and MCR 2.116(D)(1). See *In re Slis,* 144 Mich App 678, 683 (1985). Estoppel also applies. *Dogan v Michigan Basic Properties*, 130 Mich App 313, 317-318 (1983). However, estoppel requires detrimental reliance. See *Tucker v Eaton*, 426 Mich 179, 187-188 (1986).

"Courts are bound to take notice of the limits of their authority. Even if the question is not raised by either party, a court should, on its own motion, recognize its lack of jurisdiction by staying the proceedings, resolving the jurisdictional question, and dismissing the case if jurisdiction is lacking." *Smith v Smith*, 218 Mich App 727, 731 (1996) (citations omitted).

Courts lacking subject matter jurisdiction may transfer the case to a Michigan court that has it. MCR 2.227(A)(1).

*See Section 3.18 for discussion of change of venue.

Courts with jurisdiction may decline to exercise it based on forum non conveniens. For factors considered in exercising discretion, see *Cray v Gen Motors Corp*, 389 Mich 382, 395-396 (1973).*

B. Subject Matter Jurisdiction

1. Circuit Court

The Circuit Court is the court of general jurisdiction, meaning it has jurisdiction over all matters not otherwise assigned to other courts, except as otherwise provided by the Legislature. Const 1963, art 6, § 13.

In 1996, the Legislature created the Family Division of Circuit Court by transferring to Circuit Court jurisdiction many cases previously handled by the Probate Court and by requiring Circuit Court and Probate Court to develop a plan for the Family Division. MCL 600.1001 et seq. The legislation contemplated that some probate judges would serve in the Family Division. The Circuit Court may share jurisdiction with other courts under a plan of concurrent jurisdiction. MCL 600.401 et seq.

The jurisdiction of the Circuit Court includes:

Family Division. MCL 600.1021.

- Abuse and neglect
- Divorces, Paternity, Adoption
- Juvenile delinquency, name changes, emancipations

Felony criminal cases. MCL 762.1.

Civil cases involving more than $25,000. MCL 600.605.

Appeals from other Courts and agencies. MCL 600.631.

Extraordinary writs. MCL 600.611.

Equity. MCL 600.601.

Superintending control. MCL 600.615.

Authority to make local rules. MCL 600.621.

2. District Court

The District Court was created by Public Act 154 of 1968, MCL 600.8101 et seq. The District Court replaced justices of the peace and Circuit Court commissioners as required by Const 1963, art 6, § 26. The Act also abolished municipal and police courts. MCL 600.9921.

The District Court has the following jurisdiction:

- MCL 600.8301(1); MCL 600.841(2)(d) — Civil claims of $25,000 or less.
- MCL 600.8301(2); MCL 600.841(2)(d) — Civil infractions.
- MCL 600.5704 — Summary proceedings to recover land. But damage claims in excess of the jurisdictional limit must be brought in Circuit Court. *Ames v Maxson*, 157 Mich App 75, 79 (1987).
- MCL 600.8311 — Criminal.
  - Misdemeanors of 1 year or less.
  - Ordinance and charter violations.
  - Arraignment, setting bail and accepting bonds.
  - Preliminary Examinations.
- MCL 600.8401 — Small claims of $3,000 or less.
- No equitable jurisdiction, MCL 600.8315, except concurrent jurisdiction with Circuit Court regarding. MCL 600.8302:
  - In small claims cases, injunctions and orders rescinding and reforming contracts. MCL 600.8302(2).
  - In summary proceedings, equitable claims regarding interests in land and equitable claims arising out of foreclosure, partition or public nuisances. MCL 600.8302(3). See *Manufacturer's Hanover v Snell*, 142 Mich App 548, 554 (1985).
- Ordinance cases. MCL 600.8302(4).

3. Probate Court

The Probate Court shall have the jurisdiction, powers and duties as provided by law. Const 1963, art 6, § 15. There shall be a Probate Court in each county organized for judicial purposes. *Id.*

The Probate Court has the following jurisdiction:

- MCL 600.841; MCL 700.1302 — Exclusive Jurisdiction.
- MCL 700.1303 — Concurrent Jurisdiction.
- Probate court can hear all civil cases related to estates before it, except torts. MCL 600.841; MCL 700.1302.
- Such cases can also be removed from Circuit Court to Probate Court on motion of a party. MCL 700.1303(2).

- See MCL 600.1021 for jurisdiction transferred to Family Division of Circuit Court.

C. Jurisdiction of the Parties

1. General Personal Jurisdiction

- Authority to impose personal liability upon one person or entity in favor of another.
- Individuals — MCL 600.701.
- Presence in the state at time of service. MCL 600.701(1).
- Domicile in the state at time of service. MCL 600.701(2).
- Consent, subject to MCL 600.745 regarding agreements concerning jurisdiction. MCL 600.701(3). Statute addresses whether an agreement providing jurisdiction will be applied.
- Corporations — MCL 600.711. Partnerships and Limited Partnerships — MCL 600.721. Partnerships, Associations and Voluntary Associations — MCL 600.731.
- Incorporation or formation under Michigan law. MCL 600.711(1).
- Consent, subject to MCL 600.745. MCL 600.711(2). Statute addresses whether an agreement providing jurisdiction will be applied.
- "[C]arrying on a continuous and systematic part of its general business within the state." MCL 600.711(3); *Lincoln v Fairfield-Nobel Co*, 76 Mich App 514, 517-518 (1977); *June v Vibra Screw Feeders, Inc*, 6 Mich App 484, 491 (1976).

2. Limited Personal Jurisdiction

Authority to impose personal liability upon a person in favor of another, limited to damages arising out of an act which creates a specified relationship between the defendant and state — "Long Arm Statute."*

*See Section 3.1(E), below, for a discussion of constitutional limits on jurisdiction.

Individuals — MCL 600.705 — "any of the following relationships between an individual . . . and the state . . . enable a court to exercise limited personal jurisdiction over the individual and to render personal judgments against the individual . . . arising out of an act which creates any of the following relationships."

- The transaction of any business within the state.
- Doing an act or causing consequences to occur within the state resulting in an action for tort.

- Ownership, use, or possession of real or tangible personal property situated in the state.
- Contracting to insure a person, property or risk located in this state at the time of contracting.
- Entering into a contract for services or materials to be furnished within the state.
- Acting as a director . . . or other officer of a corporation incorporated under the laws of, or having its principal place of business in Michigan.
- Maintaining a domicile in Michigan while subject to a marital or family relationship which is the basis for a claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody.

Corporations — MCL 600.715.

Partnership — MCL 600.725.

Voluntary Associations — MCL 600.735(a).

D. In Rem and Quasi In Rem

In rem refers to the authority to affect the interests of all persons in a thing, even without authority to impose personal liabilities. Quasi in rem refers to the authority to affect the interests of particular persons in a thing, even without authority to impose personal liabilities.

- MCL 600.751 — Land in Michigan.
- MCL 600.755 — Chattels in Michigan.
- MCL 600.761 — Documents in Michigan.
- MCL 600.765 — Corporate stock of Michigan Corporation or other stock if certificates within Michigan.
- MCL 600.771 — Obligations owed by persons subject to jurisdiction of Michigan courts.
- MCL 600.775 — Marital, parent-child, competence. Note *Sovereign v Sovereign*, 347 Mich 205 (1956).

E. Constitutional Limitations

Due process limits the power of a state court to render a valid personal judgment against a non-resident defendant. *Shaffer v Heitner*, 433 US 186,

204 (1977); *Kulko v Superior Court of California*, 436 US 84, 91 (1978). There must be both:

Adequate notice that suit has been brought. *Mullane v Central Hanover Trust*, 339 US 306, 313 (1950); *Krueger v Williams*, 410 Mich 144, 158 (1981), AND

"Minimum Contacts" between the state and defendant. *Int'l Shoe v Washington*, 326 US 310, 316 (1945); *World-Wide Volkswagen v Woodson*, 444 US 286, 291 (1980); *Khalaf v Bankers & Shippers Insurance Co*, 404 Mich 134, 146 (1978); *Hapner v Rolf Brauchli, Inc*, 404 Mich 160, 168-169 (1978); *Jeffrey v Rapid American Corp*, 448 Mich 178, 185-186 (1995).

3-part test for determining minimum contacts— *McGraw v Parsons*, 142 Mich App 22, 26 (1985):

- Defendant must purposefully avail himself of the privilege of acting in the forum state.
- The cause of action must arise from the defendant's activities in the forum state; and,
- Defendant's acts must have substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.

Michigan's "long-arm statute" extends jurisdiction to the maximum limits permitted by due process. *Northern Ins Co of New York v B Elliott, Ltd*, 117 Mich App 308, 316 (1982); *Sifers v Horen*, 385 Mich 195, 199 (1971).

Merely advertising in the state is not enough to provide personal jurisdiction over a party in another jurisdiction. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 439 (2001)

F. Venue

*See Section 3.18 for discussion of change of venue.

Plaintiffs carry the burden of establishing the propriety of their venue choice, and the resolution of a venue dispute generally occurs before meaningful discovery has occurred. Venue is simply the location of the trial, and its determination should only concern the selection of a fair and convenient location where the merits of a dispute can be adjudicated. *Gross v Gen Motors Corp*, 448 Mich 147, 155-157 (1995).*

G. Standard of Review

Whether a court has personal jurisdiction over a party is a question of law that is reviewed de novo on appeal. *Oberlies v Searchmont Resort, Inc,* 246 Mich App 424, 426 (2001).

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo on appeal. See *Michigan Basic Property Ins Ass'n v Detroit Edison Co,* 240 Mich App 524, 528 (2000).

3.2 Jurisdiction—Each Court

Const 1963, art 6

A. District Court v Circuit Court Jurisdiction

1. District Court Jurisdiction

The District Court has exclusive jurisdiction of cases involving less than $25,000. MCL 600.8301(1).

2. Removal to District Court

MCR 2.227 covers transfer of actions upon a finding of lack of jurisdiction. See also Administrative Order 1998-1, which provides: A circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) The parties stipulate to the transfer and to an appropriate amendment of the complaint, see MCR 2.111(B)(2); or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court. Circuit courts are directed to send to the State Court Administrator copies of all orders transferring actions to district court under MCR 2.227 based on the amount in controversy.

3. Removal to Circuit Court

MCR 4.002 covers the transfer to Circuit Court of an action in which a defendant asserts a counter claim or cross-claim seeking relief in an amount or of a nature beyond the jurisdiction of the District Court.

4. Aggregating Claims

Separate plaintiffs cannot aggregate their claims to establish Circuit Court minimum jurisdiction. *Boyd v Nelson Credit*, 132 Mich App 774, 780-781 (1984). While MCR 2.206(A) permits the joinder of parties, it must be questioned whether that rule can be used to establish jurisdiction which would not otherwise exist. See for example, *Yedinak v Yedinak*, 383 Mich 409 (1970).

5. Appeals from the District Court to the Circuit Court

Such appeals are governed by MCL 600.8341 and .8342 along with MCR 7.101 et seq. MCR 7.101(E) provides the district court retains jurisdiction until a district court clerk sends the record to the circuit court clerk.

B. Probate Court v Circuit Court Jurisdiction

1. Probate Court Jurisdiction

Const 1963, art 6, § 15 and MCL 600.841.

2. Removal to Probate Court

MCL 600.845 provides that a Circuit Court with concurrent jurisdiction is not deprived of that jurisdiction by the grant of jurisdiction to the Probate Court conferred by MCL 600.801 et seq. MCL 600.846 provides for the removal of an action to Probate Court from a court which has concurrent jurisdiction.

3. Exclusive Jurisdiction

Prior to 1998, MCL 700.21 conferred exclusive jurisdiction on the Probate Court for a number of proceedings relating to estates, trusts, guardianships, conservatorships and protective proceedings. If a matter is brought in Circuit Court where exclusive jurisdiction rests in the Probate Court, it may be possible to appoint the circuit judge as an acting probate judge, or the matter may be removed to Probate Court. See MCL 600.1021 for the transfer of jurisdiction to the Family Division of the Circuit Court effective January 1, 1998.

4. Appeals from the Probate Court to Circuit Court

Such appeals are governed by MCL 600.863 and MCR 7.101 et seq. MCR 7.101(E) provides the Probate Court retains jurisdiction until it sends the record to the circuit court clerk. MCL 600.861 provides for an appeal as a matter of right to the Court of Appeals in certain specified situations.

C. Circuit Court v Court of Claims Jurisdiction

If a complaint seeks relief against the State or its agencies for money damages, and equitable or declaratory relief, the Court of Claims has exclusive jurisdiction. However, a complaint seeking only equitable or declaratory relief must be filed in the Circuit Court. MCL 600.6419a; *Silverman v University of Michigan Board of Regents*, 445 Mich 209, 217 (1994).

D. Circuit Court v Court of Appeals Jurisdiction

1. Circuit Court Jurisdiction

Const 1963, art 6, § 13, MCL 600.601 et seq and MCL 600.1001 et seq.

2. Court of Appeals Jurisdiction

Const 1963, art 6, § 10 and MCL 600.308.

MCR 7.208(A) provides that after a claim of appeal is filed or leave is granted, the trial court "may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law...."

The filing of a claim of appeal from a final judgment in the circuit court transfers jurisdiction to the Court of Appeals. MCL 600.308; *Bliss v Carter*, 26 Mich App 177, 183-184 (1970); *People v Sattler*, 20 Mich App 665, 669 (1969).

Once the claim of appeal is filed, the circuit court is divested of its jurisdiction to amend its final orders. *Wiand v Wiand*, 205 Mich App 360, 370 (1994).

The lower court reacquires jurisdiction when the clerk returns the record to it. *Dep't of Conservation v Connor*, 321 Mich 648, 654 (1948); *Luscombe v Shedd's Food*, 212 Mich App 537, 541 (1995). See MCR 7.210(H) and (I).

E. Circuit Court v Federal Court

1. Removal to Federal Court

An action originally filed in a state court may be removed to federal court if: (1) the case could have originally been filed in a federal court; and (2) for cases removed on the basis of diversity, no defendant is a citizen of the state where the action is filed. 28 USC 1441. Removal of a state case to Federal District Court is governed by 28 USC 1441-1452. Federal law controls the criteria for removal. *Grubbs v General Electric Credit Corp,* 405 US 699, 705 (1972). If the federal court concludes it does not have jurisdiction, it can remand or dismiss the case. *Carnegie-Mellon Univ v Cohill,* 484 US 343, 352-353 (1988). 28 USC 1447(c).

A notice of removal must be filed within 30 days after defendant receives a copy of the initial pleading or 30 days from the time a change in the parties or claims in the state court makes the case removable. 28 USC 1446(b).

Only defendants may exercise the right of removal. Where there is more than one defendant, all defendants must join in the petition for removal. 28 USC 1441.

Where there are multiple claims or multiple parties, a defendant may remove a whole case if it contains a separate and independent claim or cause of action within federal question jurisdiction. 28 USC 1441.

2. Bankruptcy Stay

State court proceedings may also be stayed as a result of federal bankruptcy proceedings. 11 USC 362. The automatic stay is broad and applies to most actions against a debtor or property subject to the bankruptcy estate. Generally the litigation may continue against parties that have not filed for

bankruptcy. Relief from the stay can only be requested in the bankruptcy court. 11 USC 362(d). Exceptions to the stay can be found at 11 USC 362(b).

F. Administrative Agency—"Primary Jurisdiction" Doctrine

"A question of 'primary jurisdiction' arises when a claim may be cognizable in a court but initial resolution of issues within the special confidence of administrative agency is required." *Travelers Ins Co v Detroit Edison Co,* 465 Mich 186, 197 (2001). Three factors govern the applicability of the primary jurisdiction doctrine. The court must consider: (1) the extent to which the agency's specialized knowledge makes it preferable to decide the case; (2) the need for uniformity and resolutions of the issue; and (3) the potential that the court's decision will have an adverse affect on the agency's performance of its regulatory responsibilities. *Rinaldo's Const Corp v Michigan Bell Telephone Co,* 454 Mich 65, 71 (1997).

3.3 Civil Pleadings

MCR 2.101 et seq. Commencement of action; service of process; pleadings; motions

MCR 2.201 et seq. Parties; joinder of claims and parties; venue; transfer of actions

A. Generally

The Michigan Court Rules recognize the following civil pleadings:

- Complaint
- Cross-claim
- Counterclaim
- Third-party complaint
- Answer to a complaint, cross-claim, counterclaim or third-party complaint
- Reply to an answer. MCR 2.110(A).

Responsive pleadings are required to a complaint, counterclaim, cross-claim, third-party complaint, or an answer demanding a reply. MCR 2.110(B).

The form of pleadings is governed by MCR 2.113. A party or party's attorney must sign any pleading. MCR 2.114(C).

B. Complaint

A civil action is commenced by filing a complaint with a court and the issuance of a summons. MCR 2.101(B); MCR 2.202. The complaint must set forth specific factual allegations stating a claim upon which relief can be granted and contain a demand for judgment. MCR 2.111(B). Statutes, court rules and case law contain requirements for particular types of claims. See MCR 2.112.

A party must join every claim it has against an opposing party that arises out of the transaction or occurrence that is the subject matter of the action, MCR 2.203(A), and must join parties essential to permit the court to render complete relief, MCR 2.205(A). The court rules also provide for permissive joinder of claims and parties. MCR 2.203(B) and MCR 2.206.

Unless waived by the court, a filing fee must be paid when a complaint is filed. MCL 600.2529.*

*See Section 3.6 on Waiver of Fees.

The filing of the complaint alone is insufficient to toll the statute of limitations. *Gladych v New Family Homes, Inc,* 468 Mich 594, 595, 605 (2003). The statute is tolled only when the complaint is filed and the requirements of MCL 600.5856 are met. MCL 600.5856 requires that the plaintiff make service of process on the defendant, jurisdiction over defendant be obtained by some other method, or the plaintiff delivers the summons and complaint to an officer for service and the officer makes service within 90 days. *Gladych, supra* at 595, 605. Whether a cause of action is barred by the statute of limitations is a question of law that is reviewed de novo on appeal. *Moll v Abbott Laboratories,* 444 Mich 1, 26 (1993); *Ins Comm'r v Aageson Thibo Agency,* 226 Mich App 336, 340-341 (1997).

C. Responsive Pleading

1. Appearance, MCR 2.117

MCR 2.117 addresses appearances by parties and by attorneys representing parties. An appearance by an attorney for a party is deemed an appearance by the party. MCR 2.117(B)(1). An appearance by a law firm is deemed the appearance of the individual attorney and every member of the law firm. MCR 2.117(B)(3); *Plunkett & Cooney v Capitol Bancorp,* 212 Mich App 325, 329 (1995). An attorney's appearance continues until a final judgment is entered and the time for appeal of right has passed. MCR 2.117(C)(1). An attorney who has entered an appearance may withdraw or be substituted for only on order of the court. MCR 2.117(C)(2).*

*See Section 3.20 on attorney substitution or withdrawal.

Filing an appearance entitles a party to receive copies of all pleadings and papers as provided by MCR 2.107(A). MCR 2.117(A)(2). At least one Michigan case has held that an "appearance", at least for purposes of the default rules, may be based upon written and oral communications with opposing counsel. *Ragnone v Wirsing,* 141 Mich App 263, 265-266 (1985).

2. Answer

A responsive pleading to a complaint is required. MCR 2.110(A)(5) and (B)(1). An answer is the typical responsive pleading. A motion raising a defense or an objection to a pleading must be filed and served within 21 days of service or the time for filing a responsive pleading. MCR 2.108.

3. Affirmative Defenses, MCR 2.111(F)(3)

An affirmative defense is any defense that seeks to foreclose relief for reasons unrelated to the plaintiff's prima facie case. *Kelly-Nevils v Detroit Receiving Hosp,* 207 Mich App 410, 420 (1994); *Stanke v State Farm Mutual Auto Ins Co,* 200 Mich App 307, 312 (1993). The list of affirmative defenses in MCR 2.111(F)(3) is not exclusive. *Citizens Ins Co of America v Juno Lighting, Inc,* 247 Mich App 236, 241 (2001). An affirmative defense must be stated in a party's responsive pleading or any motion for summary disposition made before the filing of a responsive pleading, or the defense is waived. MCR 2.111(F)(3); *Citizens, supra.* Whether a particular ground for dismissal is an affirmative defense under MCR 2.111(F) is a question of law that is reviewed de novo. *Id.*

D. Counterclaims and Cross-claims

MCL 600.5823 Counterclaims

MCR 2.203 Counterclaims and cross-claims

1. Counterclaim Against Opposing Party - MCR 2.203(C)

A counterclaim may, but need not, diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

2. Cross-Claim Against Co-Party - MCR 2.203(D)

A party may file a cross-claim against a co-party. MCR 2.203(D). A pleading may state, as a cross-claim, a claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or that relates to property that is the subject matter of the original action. MCR 2.203(D). The cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. MCR 2.203(D).

3. Time for Filing Counterclaim or Cross-Claim - MCR 2.203(E)

A counterclaim or cross-claim must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118. If a motion to amend to state a counterclaim or cross-claim is denied, the litigation of that claim in

another action is not precluded unless the court specifies otherwise. MCR 2.203(E).

A counterclaim arising out of the same transaction or occurrence as the principal claim must be joined in one action. MCR 2.203(A)(1); *Van Pembrook v Zero Mfg Co,* 146 Mich App 87 (1985). However, if leave to amend to state a counterclaim is denied and the ruling court does not expressly preclude a separate action, the party is not bound by the compulsory joinder rule and is free to raise the claim in another action. MCR 2.203(E). MCR 2.203(E) provides for the permissive joinder of counterclaims. *Salem v Mooney,* 175 Mich App 213, 216 (1988). However, the time for presenting a counterclaim is not always within a defendant's option. *Sahn v Brisson,* 43 Mich App 666, 671 (1972). Since the rule is permissive, as opposed to compulsory, it allows a party the option to maintain its counterclaim in a separate independent action. *Bank of the Commonwealth v Hulette,* 82 Mich App 442, 444 (1978).

Although the trial court has discretion in deciding whether to allow amendments, the "leave shall be freely given" language of MCR 2.118(A)(2) favors granting leave, and a motion to amend should generally only be denied because of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility. *Weymers v Khera,* 454 Mich 639 (1997). "If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Id.* at 659. Delay alone does not warrant denial of a motion to amend. *Id*. "However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Id.*

4. Counterclaim Excepted From Operation of Periods of Limitations - MCL 600.5823

Pursuant to MCL 600.5823, to the extent of the amount established as plaintiff's claim, the periods of limitations prescribed in chapter 58 do not bar a claim made by way of counterclaim, unless the counterclaim was barred at the time the plaintiff's claim accrued. See *Wallace v Patterson,* 405 Mich 825 (1979); *Warner v Sullivan,* 249 Mich 469 (1930).

E. Standard of Review

A trial court's decision whether to allow amendments to pleadings is reviewed for an abuse of discretion. *Grant v National Manufacturer & Plating Co,* 258 Mich 453, 455 (1932) and *Dowerk v Charter Twp of Oxford,* 233 Mich App 62, 75 (1998).

3.4 Joinder of Parties and Claims

The court rules are designed so that real parties in interest must bring the case and they must have the capacity to sue or be sued. MCR 2.201. The rules also

provide for the substitution of parties. MCR 2.202. Finally, parties are required to "join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." MCR 2.203(A). A party may join other claims that it has against an opposing party. MCR 2.203(B).

Parties are required to join "persons having such interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief." MCR 2.205(A). The court is required to summon such parties into the action. MCR 2.205(B). If the court cannot obtain jurisdiction, it may still proceed as provided by MCR 2.205(B). The court rules also provide for the permissive joinder of parties if it "will promote the convenient administration of justice" or if they assert a right to joint or several relief or relief arising out of the same transaction or transactions if a question of law or fact is common to all of the parties. MCR 2.206(A). The court has the authority to add or drop parties. MCR 2.207.

As discussed in Section 3.10, persons may also have the right to intervene in an action. MCR 2.209.

3.5 Res Judicata and Collateral Estoppel

A. In General

The concepts of res judicata and collateral estoppel are designed to prevent the relitigation of claims that have already been litigated or should have been litigated in a prior case. The terms res judicata and collateral estoppel are often used without distinction. *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 726 (1973). Those theories and their definitions are:

- Res judicata "bars the reinstitution of the same cause of action by the same parties in a subsequent suit." *Id.* at 727.
- Collateral estoppel "bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action." *Id.*

The above "two principles fulfill the judicial policy of providing the parties with a final decision upon litigated questions." *Id.*

B. Prerequisites for Applying Res Judicata

> "There are three prerequisites to the application of the res judicata doctrine: (1) there must have been a prior decision on the merits; (2) the issues must have been resolved in the

> first action, either because they were actually litigated or because they might have been presented in the first action; and (3) both actions must be between the same parties or their privies. . . . Michigan courts apply the res judicata doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction which a plaintiff could have brought, but did not." *VanDeventer v Michigan Nat Bank*, 172 Mich App 456, 464 (1988) (citations omitted).

A party may not unilaterally elect to present only a portion of its case at trial and, at the same time, reserve its right to litigate the remaining portion at a separate proceeding in the future. Unlike collateral estoppel, which bars relitigation of only those issues actually decided, res judicata bars relitigation of claims actually litigated or arising out of the same transaction. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 92 (1995).

The burden of proving the application of res judicata is on the party asserting it. *Sloan v City of Madison Heights*, 425 Mich 288, 295 (1986).

Res judicata applies if there was a prior federal case. *Sewell v Clean Cut Mgt, Inc,* 463 Mich 569, 575 (2001); *Carter v SEMTA*, 135 Mich App 261 (1984); but see also *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372 (1999).

The application of res judicata is a question of law that is reviewed de novo. *Phinisee v Rogers*, 229 Mich App 547, 551-552 (1998).

C. Prerequisites for Applying Collateral Estoppel

In order for collateral estoppel to apply, the identical issue in the first action must be involved in the second action, and the parties must have had a full opportunity to litigate that issue in the first action. Collateral estoppel conclusively bars only issues "actually litigated" in the first action. A question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for determination, and thereafter determined. *Barrow v Pritchard,* 235 Mich App 478, 483–85 (1999); *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463 (1988) (citations omitted).

Crossover estoppel, which involves the preclusion of an issue in a civil proceeding after a criminal proceeding and vice versa, is permissible. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 145-146 (1992); *People v Gates*, 434 Mich 146, 155 (1990).

Collateral estoppel may not apply to consent judgments. *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102-103 (1985).

The application of collateral estoppel is a question of law which is reviewed de novo. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555 (1995);

McMichael v McMichael, 217 Mich App 723, 727 (1996); *Barrow v Pritchard*, 235 Mich App 478, 480 (1999).

3.6 Waiver of Fees

MCR 2.002 Waiver or suspension of fees and costs for indigent persons

A. Generally

MCR 2.002 authorized a trial court to relieve an indigent person of his obligation to pay filing fees and assures that a complainant will not be denied access to the courts on the basis of indigence. *Lewis v Dep't of Corrections*, 232 Mich App 575, 579 (1998) and *Wells v Dep't of Corr*, 447 Mich 415, 419 (1994).

MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of filing fees.

For instances in which fees are not required, see MCL 722.727. See also MCL 722.904(2)(f) and MCR 3.703(A).

B. Reinstatement of Fees

The court may reinstate the fees and costs previously waived, if, at the conclusion of the litigation, the reason for the waiver or suspension no longer exists. MCR 2.002(G).

Prior to revoking a previously granted waiver or suspension of filing fees and costs pursuant to MCR 2.002(G), a court must determine whether the litigant is indigent at the time of the revocation of the waiver or suspension. *Martin v Dep't of Corr (On Remand)*, 201 Mich App 331, 335 (1993).

A court reinstating the obligation to pay filing fees is not required to establish a petitioner's indigence in any particular manner. *Lewis v Dep't of Corrections*, 232 Mich App 575, 582 (1998).

When the suspension of filing fees was due to the court process, not the petitioner's indigence, and there was no determination that the petitioner would forever be unable to pay the fees, the trial court did not abuse its discretion in reinstating the obligation to pay suspended filing fees. *Koss v Dep't of Corr*, 184 Mich App 614, 617 (1990).

The trial court noted that it suspended the filing fees to ensure timely review of the prisoner petitioner's complaint. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445-446 (1992). The trial court did not abuse its discretion in reinstating peitioner's obligations to pay the fees following review of petitioner's complaint. *Id.*

C. Standard of Review

A trial court's decision to grant a defendant's motion for production of transcripts at public expense is reviewed for an abuse of discretion. *People v Cross*, 30 Mich App 326, 336 (1971).

3.7 Summons

MCR 2.102 Summons; expiration of summons; dismissal of action for failure to serve

A. First Summons

The clerk issues a summons when the complaint is filed. MCR 2.102(A). The form of the summons is prescribed by court rule. MCR 2.102(B). The summons expires 91 days after the date the complaint is filed. MCR 2.102(D).

If a defendant is not served before the expiration of the summons, the action is deemed dismissed without prejudice as to that defendant unless the defendant has submitted to the court's jurisdiction. MCR 2.102(E)(1). The dismissal is without prejudice. MCR 2.102(E)(1). The court may set aside the dismissal on the stipulation of the parties or a motion as provided by MCR 2.102(F). The motion must be filed within 28 days after notice of the order of dismissal was given, or if notice was not given, promptly upon learning of the dismissal. MCR 2.102(F)(3). In addition, the moving party must establish that proof of service was in fact made or the defendant submitted to the court's jurisdiction, MCR 2.102(F)(1), and "proof of service of process was filed or the failure to file is excused for good cause shown," MCR 2.102(F)(2).*

*See Section 3.8 on service of process.

B. Second Summons

A request to extend the summons must be made before the summons expires. MCR 2.102(D). If the order allowing the second summons is entered within the time period of the original summons, the second summons is effective even if it was issued after the expiration of the original summons. *Moriarity v Shields,* 260 Mich App 566, 575 (2004).

The request must be supported by a showing of good cause. MCR 2.102(D).

Whether good cause exists to extend the life of the original summons depends on whether the plaintiff diligently tried to serve defendants. *Bush v Beemer*, 224 Mich App 457, 462 (1997). Due diligence under MCR 2.102(D) means diligent efforts in trying to serve process, not diligence in matters logically preceding the decision to serve process. *Id.* at 464.

The issuance of a third summons is not permitted under MCR 2.102(D). *Hyslop v Wojjusik*, 252 Mich App 500, 506-507 (2002).

C. Failure to Serve

Dismissal is automatic if service is not made, MCR 2.102(E), and cannot be set aside except as provided by MCR 2.102(F).

3.8 Service of Process

MCL 600.1801 et seq. Process

MCL 600.1901 et seq. Commencement of action and service of process

MCR 2.101-2.109 Service of process

A. Substituted Service—MCR 2.104-2.106

The court rules address when and how substituted service can be made.

B. Service by Mail

"The proper addressing and mailing of a letter creates a legal presumption that it was received. This presumption may be rebutted by evidence, but whether it was is a question for the trier of fact." *Stacey v Sankovich,* 19 Mich App 688, 694 (1969).

C. Defects in Proof of Service

1. Amendment

"Service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Hill v Frawley,* 155 Mich App 611, 613 (1986).

MCL 600.1905(3) and MCR 2.102(C) permit amendments to correct defects in proof of service.

It is only where there is a failure of service of process that dismissal is warranted. *Holliday v Townley,* 189 Mich App 424, 425-426 (1991).

2. Effect

Defects in the service of process are not necessarily fatal to the cause of action. An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in the rules for service. MCR 2.105(J)(3); *MEA v N Dearborn Hts Schools*, 169 Mich App 39, 45 (1988); *Bunner v Blow Rite Insulation Co*, 162 Mich App 669, 674 (1987); *Hill v Frawley*, 155 Mich App 611, 613 (1986); *Holliday v Townley*, 189 Mich App 424, 425 (1991); *Hayden v Gokenbach*, 179 Mich App 594 (1991); *In re Gosnell*, 234 Mich App 326, 344 (1999).

3. Challenge

Summary disposition* may be granted where "[t]he service of process was insufficient." MCR 2.116(C)(3). Affidavits, together with any other documentary evidence submitted by the parties, must be considered by the trial court. MCR 2.116(G)(5). All factual disputes for the purpose of deciding the motion are resolved in favor of the nonmoving party. See *Jeffrey v Rapid American Corp,* 448 Mich 178, 184 (1995). If the defendant actually receives service of process within the life of the summons, the fact that the manner of service was improper is not grounds for dismissal. MCR 2.105(J)(3); *Hill v Frawley,* 155 Mich App 611 (1986). It is only where there is a failure of service of process that dismissal is warranted. *Holliday v Townley,* 189 Mich App 424, 425-426 (1991).

*See Section 3.24 on summary disposition.

3.9 Third Party Practice

MCR 2.204 Third-party practice

A. Generally

Both a defendant and a plaintiff may serve a complaint against a third party who may be liable to the party for a claim asserted against the party. MCR 2.204(A) and (B).

B. Timing

Leave is not required to serve the third-party complaint if the third-party complaint is filed within 21 days of the third-party plaintiff's original answer. MCR 2.204(A)(1). After 21 days leave on motion is required. MCR 2.204(A)(1). A court should be liberal in exercising its discretion to join third parties, considering factors such as the probability of delay, complications of the trial, timeliness of the motion, similarity of the evidence, and possibility of prejudice. *Moyses v Spartan Asphalt,* 383 Mich 314, 324-325 (1970).

C. Standard of Review

A trial court's decision regarding whether to grant or deny a motion to file a third-party complaint is reviewed for an abuse of discretion. *Moyses, supra* at 323; *Morris v Allstate Ins Co,* 230 Mich App 361, 370 (1998).

3.10 Intervention

MCR 2.209 Intervention

A. Intervention of Right—MCR 2.209(A)

On timely application a person has a right to intervene in an action:

(1) when a Michigan statute or court rule confers an unconditional right to intervene;

(2) by stipulation of all the parties; or

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

B. Permissive Intervention—MCR 2.209(B)

On timely application a person may intervene in an action

(1) when a Michigan statute or court rule confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

C. Timing

A right to intervene should be asserted within a reasonable time. *D'Agostini v City of Roseville,* 396 Mich 185, 188 (1976). Laches or unreasonable delay by the intervenors is a proper reason to deny intervention. *Id.*

A timely application for permissive intervention must be an application before an adjudication of the case on the merits. *Dean v Dep't of Corr,* 208 Mich App 144, 152 (1994).

D. Decision

Intervention is a matter of discretion with the trial judge. *Precision Pipe v Meram,* 195 Mich App 153, 156 (1992). However, the court rule should be liberally construed to allow intervention when the applicant's interest may be inadequately represented. *D'Agostini v Roseville,* 396 Mich 185, 188-189 (1976).

In *Davenport v G P Farms Zoning Bd,* 210 Mich App 400, 408 (1995), the Court of Appeals found that it was within the trial court's discretion to determine whether the motion to intervene was timely when the moving party had knowledge of the action and it was not filed until after the circuit court issued its decision.

There should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant. *Dean v Dep't of Corrections,* 208 Mich App 144, 150 (1994).

E. Intervenor Becomes a Party

Once permitted to intervene, whether as of right or by leave, the intervenor becomes a party to the action and is bound by the judgment. *Grand Rapids v Consumers Power Co,* 216 Mich 409, 415 (1921); *Eyde v Meridian Charter Twp,* 118 Mich App 43, 50 (1982).

F. Costs

A party who intervenes in an action as a plaintiff in the hopes of recovering damages from the defendant but does not actively participate in the prosecution of the action is a party in interest for purposes of the recovery of damages from the defendant as well as for the purposes of the taxation of costs in the defendant's favor where the defendant is the prevailing party in the action. MCR 2.625(a)(1); *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp,* 221 Mich App 301 (1997).

G. Standard of Review

A trial court's decision to grant or deny a motion to intervene is reviewed for an abuse of discretion. *Precision Pipe, supra* at 156.

3.11 Motion for More Definite Statement

MCR 2.115(A) Motion for more definite statement

A. Generally

The remedy for a deficient pleading is a motion for a more definite statement. Pursuant to MCR 2.115(A), if a pleading is so vague or ambiguous that it fails to comply with the requirements of these rules, an opposing party may move for a more definite statement before a responsive pleading. The motion must point out the defects complained of and the details desired. *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55 (1995). If the motion is granted and is not obeyed within 14 days after notice of the order, or within such other time as the court may set, the court may strike the pleading to which the motion was directed or enter an order it deems just. MCR 2.115(A).

B. Timing

The motion must be filed before the responsive pleading. *Hofmann v Auto Club Ins,* 211 Mich App 55, 90 (1995). A motion for a more definite statement comes too late if made after answering the complaint. *Goldstein v Kern,* 82 Mich App 723 (1978). Although it is a motion that raises a defense or an objection to a pleading, it arguably falls within the rule requiring such motions to be filed and served within the time for filing a responsive pleading. MCR 2.108(B).

C. Standard of Review

No case stating the standard of review has been located. However, the language of the court rule is discretionary and the Michigan Court of Appeals has held in *Ortiz v Textron,* 140 Mich App 242, 245 (1985), that a trial court has broad discretion in fixing the time within which a more definite statement will be required, if a motion for more definite statement is granted.

3.12 Motion to Strike

MCR 2.115(B) Motion to strike

A. Generally

On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules. MCR 2.115(B).

B. Timing

A motion to strike should be allowed at any reasonable time. *Belle Isle Grill Corp v City of Detroit,* 256 Mich App 463, 471 (2003). The time limit imposed under MCR 2.108(B) should not be interpreted to control motions under MCR 2.115(B). *Id.*

C. Standard of Review

A trial court's decision regarding a motion to strike a pleading, pursuant to MCR 2.115, is reviewed for an abuse of discretion. *Jordan v Jarvis,* 200 Mich App 445, 452 (1993).

3.13 Amendment of Pleadings

MCL 600.2301 et seq. Amendments

MCR 2.118 Amended and supplemental pleadings

A. Amendments of Right — MCR 2.118(A)(1)

Pursuant to MCR 2.118(A)(1), a party may amend a pleading without the consent of an opponent and without the permission of the court if the amendment is made within 14 days of being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading to be amended if it is a pleading that does not require a responsive pleading.

B. Amendments by Consent and by Leave of Court — MCR 2.118(A)(2)

A pleading may be amended at any time with the written consent of the adverse parties. MCR 2.118(A)(2).

A pleading may also be amended by leave of the court. Leave to amend shall be freely given when justice so requires. MCR 2.118(A)(2). In *Fyke & Sons v Gunter Co*, 390 Mich 649 (1973), the Michigan Supreme Court discussed the former court rule, GCR 1963, 118.1, which is identical to MCR 2.118(A)(2). The Court, relying upon *United States v Hougham*, 364 US 310, 316 (1960), stated that the rule is designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result. A motion to amend ordinarily should be granted, and denied only for particularized reasons, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice or futility. *Fyke, supra* at 656, and *Weymers v Khera*, 454 Mich 639, 658-660 (1997).

"'Prejudice' refers to matters which would prevent a party from having a fair trial, or matters which he could not properly contest, e.g. when surprised. It does not refer to the effect on the result of the trial otherwise." *Fyke, supra* at 657. See also *Weymers, supra* at 659.

The Court of Appeals has ruled that inexcusable delay, by itself, is not sufficient to deny a motion to amend. In *Stanke v State Farm Mutual Auto Ins Co*, 200 Mich App 307, 321 (1993), the Court stated that there must always be some delay associated with an amendment of a pleading. Leave to amend should be granted unless the delay occurred as a result of bad faith or created actual prejudice. Inexcusable delay certainly would permit the imposition of sanctions under MCR 2.118(A)(3).

"Where a summary judgment has been entered against a party he can only amend his complaint by leave of the court." *Steel v Cold Heading Co*, 125 Mich App 199, 203 (1983). See also *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 288-289 (1986).

C. Futile Amendments — MCR 2.118(A)(3)

The court may refuse to permit an amendment when the amendment may be futile. *Fyke & Sons v Gunter Co*, 390 Mich 649, 656 (1973). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Tolbert v US Truck Co*, 179 Mich App 471, 473 (1989) (citing *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 783 (1988)).

D. Response to Amendments—MCR 2.118(B)

If a party is served with an amended pleading of a type requiring a responsive pleading under MCR 2.110(B), the party has two choices: (a) serve and file a pleading in response to the amended pleading; or (b) serve and file a notice that the pleading filed in response to the pre-amendment pleading will also stand as a response to the amended pleading.

E. Amendments to Conform to Evidence — MCR 2.118(C)

When issues not raised by the parties' pleadings are tried, "by express or implied consent of the parties" they are treated as if they had been raised by the pleadings. MCR 2.118(C)(1).

If evidence concerning issues not raised in the pleadings is objected to at trial on those grounds, amendment of the pleadings to conform to the offered proof may be permitted, but the presumption is that it should not be "unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits." MCR 2.118(C)(2). Prejudice may be reduced by granting an adjournment to a party surprised by the attempt to introduce

issues not raised in the pleadings. If the Court believes that prejudice to the opposing party cannot be avoided but that a continuance is not appropriate, it may deny permission to amend. See *Weymers v Khera*, 454 Mich 639, 659-660 (1997) and *Cremonte v Dep't of State Police*, 232 Mich App 240, 248-250 (1998).

Adjournments, which are normally subject to MCR 2.503, are not relevant to MCR 2.118(C)(2), because no motion for an adjournment is required under this court rule.

F. Relation Back of Amendments — MCR 2.118(D)

Generally, amendments to pleadings relate back to the date of the original pleading "if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading." MCR 2.118(D). Amended pleadings can introduce new facts, theories or causes of action, so long as the amendment arises from the same transactional setting that was set forth in the original pleading. *LaBar v Cooper*, 376 Mich 401, 406 (1965). MCR 2.118(D) authorizes only new claims or defenses.

The relation back rule is used to determine whether the statute of limitations has run if the complaint is amended. For purposes of the statute of limitations, an action is commenced by the filing of the complaint. *Buscaino v Rhodes*, 385 Mich 474, 483 (1971), rev'd on other grounds 461 Mich 15 (1999). There are three procedural situations involving amendments of pleadings in which the problem of relation back may arise: (1) the "misnomer" cases where the plaintiff chooses the proper defendant but misnames the defendant and seeks, after the statute of limitations has run, to correct the error; (2) cases where the plaintiff has misidentified the defendant and seeks, after the statute of limitations has run, to amend the complaint and serve the proper defendant; and (3) cases where the plaintiff seeks to add a defendant after the statute of limitations has run.

The first problem in these situations is the service of process, which is defective in each of the three cases (for misnaming the defendant, for being on the wrong defendant, or for not being made at all on the added defendant). Assuming that the plaintiff's problems with improper service can be overcome, the second problem is whether there remains an error in the complaint which is corrected after the statute of limitations has run.

The relation back doctrine does not extend to the addition of new parties, including a new plaintiff. *Hurt v Michael's Food Center*, 220 Mich App 169, 179 (1996); *Employers Mut Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 63 (1991). However, the doctrine may apply to a closely connected new party. See *Wells v The Detroit News, Inc*, 360 Mich 634, 641 (1960) and *Arnold v Schecter*, 58 Mich App 680, 683-684 (1975).

Jury Demand. The amendment rule cannot be used to demand a trial by jury. MCR 2.118(D).

G. Standard of Review

The grant or denial of a motion for leave to amend pleadings is reviewed for an abuse of discretion. *Phinney v Perlmutter,* 222 Mich App 513, 523 (1997).

3.14 Pro Per (Self-Represented) Litigants

Const 1963, art 1, § 13

MCL 600.1430 Appearance in court by attorney or in person

In a civil case, a party has a right to represent himself or herself. No special warnings or cautions are required. It is good practice to caution the party that he or she has a right to consult with and be represented by an attorney and that he or she should not expect special treatment because he or she is representing himself or herself. In addition, reference might be made to particular statutes, court rules or rules of evidence that may have significance in a particular case. Explain to in a pro per party that he or she does not have to testify, but if he or she does testify, he or she subjects himself or herself to cross-examination.

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.15 Motions

MCR 2.119 Motion practice*

*Discovery motions are addressed in Section 3.25.

A. Form — MCR 2.119(A)

1) In writing (unless during trial or hearing). MCR 2.119(A)(1)(a).

2) State grounds and authority. MCR 2.119(A)(1)(b).

3) State relief sought. MCR 2.119(A)(1)(c).

4) Signed by party or attorney as provided in MCR 2.114. MCR 2.119(A)(1)(d).

5) If after rejection of proposed order under MCR 2.114(D), rejected order and affidavit must be attached. MCR 2.119(A)(4).

6) Brief required if motion or response presents issue of law. Maximum length of motion and brief combined is 20 pages. Copy must be provided to judge. MCR 2.119(A)(2).

B. Affidavit (If Required) — MCR 2.119(B)

1) Personal knowledge. MCR 2.119(B)(1)(a).

2) Particularity. MCR 2.119(B)(1)(b).

3) Facts admissible as evidence. MCR 2.119(B)(1)(b).

4) Affiant, if sworn as witness, can testify competently. MCR 2.119(B)(1)(c).

5) Referred documents attached (with certain exceptions). MCR 2.119(B)(2).

C. Notice—MCR 2.119(C) — Not Applicable to Motions for Summary Disposition — MCR 2.116(G)(1)

1) Motion, notice of hearing and brief—MCR 2.119(C)(1) and (4):

   a) 9 days if mailed.

   b) 7 days if delivered.

2) Response, brief and affidavits—MCR 2.119(C)(2) and (4):

   a) 5 days if mailed.

   b) 3 days if delivered.

3) Court may set different times—MCR 2.119(C)(3):

   a) Endorsed in writing on face of notice.

   b) Separate order.

D. Uncontested Orders — MCR 2.119(D) — Optional Process

1) Party may serve request to stipulate and proposed order on opposing party.

2) Within 7 days, other party may stipulate or waive notice and hearing.

3) Order rejected unless stipulation or waiver filed within 7 days.

4) If stipulation or waiver, court may enter or require hearing.

5) Moving party serves copy of order, or notifies parties that court requires hearing.

6) Adjournments are governed by MCR 2.503(B).

E. Contested Motions — MCR 2.119(E)

1) Set for hearing. Court designates time and may reset. MCR 2.119(E)(1).

2) Argument and briefs. Court may:

   a) Eliminate or limit oral arguments on motions. MCR 2.119(E)(3).

   b) Order briefs in support of and in opposition to motion. MCR 2.119(E)(3).

   c) Order an evidentiary hearing. MCR 2.119(E)(2).

3) Hearing. Court may hear on affidavits, or order testimony or depositions. MCR 2.119(E)(2). The trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. *Williams v Williams,* 214 Mich App 391, 399 (1995).

   The decision whether to hold an evidentiary hearing under MCR 2.119(E)(2) is reviewed for an abuse of discretion. *Id.*

4) Appearances at Hearing—MCR 2.119(E)(4):

   a) Opposing party must appear or file concise statement of reasons for opposition or if the party rejected a proposed MCR 2.119(D) order. MCR 2.119(E)(4)(a).

   b) Moving party must appear unless excused by Court. MCR 2.119(E)(4)(b).

   c) Failure to appear — the Court shall assess costs against party, attorney or both, including attorney fees, unless award would be unjust. MCR 2.119(E)(4)(c).

F. Decision

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions. *People v Shields*, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4) and Section 3.53 on findings of fact and conclusions of law.

A decision should be rendered no later than 35 days after submission. Administrative Order No 2003-7.

G. Entry of Order—MCR 2.602

MCR 2.602 addresses the entry and settlement of orders.

3.16 Reconsideration or Rehearing

MCR 2.119(F) Motions for reconsideration or rehearing

A. Requirements

1) Must be filed and served 14 days after entry of order. MCR 2.119(F)(1).

2) No response allowed; no oral argument unless ordered by Court. MCR 2.119(F)(2).

3) Moving party must demonstrate palpable error. MCR 2.119(F)(3).

B. Decision

A motion for rehearing under MCR 2.119(F) should not be granted unless the motion is filed within 14 days after the challenged decision and the moving party demonstrates a palpable error by which the Court and the parties have been misled and shows that a different disposition of the motion must result from correction of the error. A motion for rehearing or reconsideration which merely presents the same issue ruled on by the Court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3).

The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. The time requirement for filing a motion insures the motion will be brought expeditiously but is not jurisdictional. *Bers v Bers*, 161 Mich App 457, 462-463 (1987). The provisions of MCR 2.119(F) do not restrict the discretion of the trial judge to reconsider a motion where he later determines that he or his predecessor made a serious error, based on an intervening change in the law or otherwise. *Brown v Northville Hosp*, 153 Mich App 300, 309 (1986).

The "palpable error" requirement of MCR 2.119(F)(3) merely provides guidance to the trial court in deciding reconsideration motions and does not operate to restrict the trial court's discretion in determining whether a grant of reconsideration is appropriate in a particular case. *Fetz Engineering v Ecco Systems*, 188 Mich App 362, 373 (1991), vacated 439 Mich 970 (1992).*

*See Appendix for form Order Denying Motion for Reconsideration.

C. Standard of Review

A court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. The rule allows the court considerable discretion to limit its reconsideration to the issue it believes warrants further consideration. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610 (1989); *In re*

Beglinger Trust, 221 Mich App 273, 279 (1997); *Kokx v Bylenga*, 241 Mich App 655, 658-659 (2000).

3.17 Security for Costs

MCR 2.109 Security for costs

A. Basis

MCR 2.109(A) provides that on motion of a party, the court may order security for costs. The court on its own may also require security. *Zapalski v Benton*, 178 Mich App 398, 404 (1989). Whether to require security is discretionary and requires a substantial reason. *Wells v Fruehauf Corp*, 170 Mich App 326, 335 (1988); *Attorney General v Oakland Disposal, Inc*, 226 Mich App 321, 331 (1997). A substantial reason exists when there is a tenuous legal theory of liability or where there is a good reason to believe a party's allegations are groundless and unwarranted. *Id.* at 332.

B. Exceptions

MCR 2.109(C) provides exceptions. Financial inability is a basis for proceeding without security if the party's pleading states a legitimate claim. *West v Roberts*, 214 Mich App 252, 254 (1995), rev'd 454 Mich 879 (1997) (insufficient proof of insolvency offered); MCR 2.109(C)(1).

C. Sanction

After giving a reasonable opportunity to comply with the order requiring security, the court may dismiss the claim. *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 273 (1990).

D. Standard of Review

Abuse of discretion is the standard of review. *Wells v Fruehauf Corp,* 170 Mich App 326, 335 (1988).

3.18 Change of Venue

MCL 600.1621 et seq. Venue

MCR 2.221-2.226 Motion for change of venue

A. Generally

The court rules distinguish between motions for change of venue when venue is proper, MCR 2.222, and when venue is improper, MCR 2.223.*

*See Section 3.1 on jurisdiction.

Plaintiffs carry the burden of establishing the propriety of their venue choice, and the resolution of a venue dispute generally occurs before meaningful discovery has occurred. Venue is simply the location of the trial, and its determination should only concern the selection of a fair and convenient location where the merits of a dispute can be adjudicated. *Gross v Gen Motors Corp,* 448 Mich 147, 155-157 (1995).

B. Timing

A motion for change of venue must be filed before or at the time the defendant files an answer. MCR 2.221(A). However, a late motion can be considered if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed. MCR 2.221(B). An objection to venue is waived if not raised within the time limits imposed by the court rule. MCR 2.221(C).

C. Change of Proper Venue—MCR 2.222

MCR 2.222 permits the change of proper venue.

Under MCL 600.1655, venue of a civil action brought in a proper court may be changed to any other county on grounds permitted by court rule. MCR 2.222 provides for a change of venue for the convenience of parties and witnesses or when an impartial trial cannot be held where the trial is pending. If venue is proper, the court may not change venue on its own initiative; a motion is required. MCR 2.222(B).

There are various factors to be considered in determining the convenience of the forum under the categories of the litigants' private interest, matters of public interest, and the defendant's promptness in raising the issue. *Cray v Gen Motors Corp,* 389 Mich 382, 395-396 (1973). "A plaintiff's selection of a forum is ordinarily accorded deference" and should not be disturbed unless the balance of the factors is strongly in the defendant's favor. *Anderson v Great Lakes Dredge & Dock Co,* 411 Mich 619, 628 (1981). The trial court's decision to dismiss an action on the basis of forum non conveniens is reviewed on appeal for an abuse of discretion. *Miller v Allied Signal, Inc,* 235 Mich App 710, 713 (1999).

Where the requested transfer is for the convenience of the parties, defendant must make a persuasive showing of inconvenience so as to overcome the deference accorded to plaintiff's choice of venue. *Huhn v DMI, Inc,* 207 Mich

App 313, 319 (1994), reconsidered and rev'd on other grounds 215 Mich App 17.

Defendant waives any claim for change of venue by not filing a motion before or at the time he or she filed an answer. MCR 2.221. See also *Huhn, supra.*

Venue is determined under the facts existing when the case is filed, and the plaintiff bears the burden of establishing that the county chosen is proper. See *Johnson v Simongton,* 184 Mich App 186, 188 (1990).

The burden of demonstrating inconvenience or prejudice as grounds for change of venue rests on the moving party, who must make a persuasive showing. *Chilingirian v Fraser,* 182 Mich App 163, 165 (1989).

"The principle of forum non conveniens establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked. It presupposes that there are at least two possible choices of forum." *Manfredi v Johnson Controls, Inc,* 194 Mich App 519, 521-522 (1992).

"When a party requests that a court decline jurisdiction based on the doctrine of forum non conveniens, there are two inquiries for the court to make: whether the forum is inconvenient and whether there is a more appropriate forum available. If there is not a more appropriate forum elsewhere, the inquiry ends and the court may not resist imposition of jurisdiction. If there is a more appropriate forum, the court still may not decline jurisdiction unless its own forum is seriously inconvenient." *Robey v Ford Motor Co,* 155 Mich App 643, 645 (1986).

1. Fees; Costs

If the court grants the motion to change venue, its order must contain a requirement for the moving party to pay the statutory filing fee for the court to which the action is transferred. MCR 2.222(d).

D. Change of Improper Venue—MCR 2.223

MCR 2.223 addresses change of venue when venue is improper. To determine whether venue is improper, the court should consult MCL 600.1621.

If the venue is improper, the court

> (1) shall order a change of venue on timely motion of a defendant, or
>
> (2) may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question. MCR 2.223(A).

Upon a timely motion to change venue and a finding that venue is improper, it is mandatory that the trial court transfer the case to a county with proper venue. MCL 600.1651; *Miller v Allied Signal, Inc,* 235 Mich App 710, 716-717 (1999). It is the plaintiff's burden to establish that the county chosen is the proper venue. *Karpinski v St John Hosp,* 238 Mich App 539, 547 (1999).

1. Fees; Costs

Because a transfer of venue under MCR 2.223 necessarily relies on a finding that the plaintiff's choice of venue was improper from the outset, MCR 2.223 (B)(1) mandates that the transfer be at "plaintiff's cost."

E. Waiver of Change of Venue

The right to change venue is waived if a motion is not made within the limitations imposed by MCR 2.221, and failure to timely raise a claim of improper venue in the lower court precludes consideration of the claim on appeal. *Bursley v Fuksa,* 164 Mich App 772, 778-779 (1987).

F. Standard of Review

A ruling on a motion for change of proper venue is reviewed for an abuse of discretion. *Brown v Hillsdale County Rd Comm'n,* 126 Mich App 72, 78 (1983).

A ruling on a motion for change of improper venue is reviewed for clear error. *Massey v Mandell,* 462 Mich 375, 379 (2000).

3.19 Separate or Joint Trial

MCR 2.505 Consolidation; separate trials

MCR 2.206(B) Separate trials

A. The Court Has Discretion to Consolidate or Sever Trials

MCR 2.505:

> "(A) Consolidation. When actions involving a substantial and controlling common question of law or fact are pending before the court, it may
>
> > (1) order a joint hearing or trial of any or all the matters in issue in the actions;
> >
> > (2) order the actions consolidated;

> (3) enter orders concerning the proceedings to avoid unnecessary costs or delay.
>
> "(B) Separate Trials. For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues."

The court rule does not include time requirements.

B. Standard of Review

Decisions regarding consolidation rest in the sound discretion of the trial court. Consolidation should not be ordered if the substantial rights of a party would be adversely affected or if juror confusion would result. *Bordeaux v Celotex Corp*, 203 Mich App 158, 163-164 (1993).

"The decision to sever trials is within the trial judge's discretion and should be ordered only upon a most persuasive showing." *Hodgins v Times Herald Co*, 169 Mich App 245, 261 (1988).

3.20 Substitution or Withdrawal of Attorney

MCR 2.117(C) Duration of appearance by attorney

MRPC 1.16

A. Order Required

The court should permit the withdrawal or substitution of counsel only with a stipulation and order or after a hearing on a motion to withdraw served upon the client. "An attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court." MCR 2.117(C)(2); see also *In re Daggs*, 384 Mich 729, 732 (1971).

B. Standard of Review

"We review a trial court's decision regarding a motion to withdraw for an abuse of discretion." *People v Echavarria*, 233 Mich App 356, 368-369 (1999); *In re Withdrawal of Atty*, 234 Mich App 421, 431 (1999).

3.21 Adjournments

MCR 2.503 Adjournments

A. Applicability — 2.503(A)

Trials, alternative dispute resolution processes, pretrial conferences, all motion hearings.

B. Requirements — 2.503(B) and (C)

Motion or stipulation, in writing or on the record, based on good cause — MCR 2.503(B). Must include:

1) Which party is requesting adjournment. MCR 2.503(B)(2)(a).

2) Reason for adjournment. MCR 2.503(B)(2)(b).

3) Whether other adjournments have been granted and, if so, the number granted. MCR 2.503(2)(c).

4) Caption must specify whether it is the first or later request. MCR 2.503(B)(3).

Unavailability of witness or evidence as basis — MCR 2.503(C):

1) To be made as soon as possible after knowledge. MCR 2.503(C)(1).

2) Court must find:

   a) Evidence is material; and,

   b) Diligent efforts have been made to produce the witness or evidence. MCR 2.503(C)(2).

3) If adverse party stipulates in writing or on the record to the evidence, adjournment not required. MCR 2.503(C)(3).

C. Order — 2.503(D)

1) In writing or on the record. MCR 2.503(D)(1).

2) Must state reason for adjournment. MCR 2.503(D)(1).

3) Court may impose costs and conditions. Adjournment may be vacated if nonpayment is shown by affidavit. MCR 2.503(D)(2).

D. Reschedule—MCR 2.503(E)

Adjourn to date certain or place on list for automatic reappearance. MCR 2.503(E).

E. Conflict With Another Court

MCR 2.501(D) addresses scheduling conflicts. If the conflict cannot be resolved, the judges shall consult directly to resolve the conflict. MCR 2.501(D)(2). Except where statute, court rule or special circumstances dictate otherwise, priority is given to the trial set first. MCR 2.501(D)(3).

F. Standard of Review

The decision whether to grant a continuance or adjournment is discretionary. *Soumis v Soumis*, 218 Mich App 27, 32 (1996). The court may grant an adjournment to promote the cause of justice. *Id.* The decision is reviewed for an abuse of discretion. *Id.*; *Zevillo v Dyksterhouse*, 191 Mich App 228, 230 (1991).

The withdrawal of counsel does not give a party the absolute right to a continuance since the decision whether to grant the request is discretionary. *Bye v Ferguson*, 138 Mich App 196, 207-208 (1984). However, in Bye, the failure to grant the adjournment was an abuse of discretion. *Id.*

3.22 Dismissal

MCR 2.102(E) Dismissal as to Defendant Not Served

MCR 2.502 Dismissal for Lack of Progress

MCR 2.504 Dismissal of Actions

A. Generally

Dismissal of the case may occur in the following circumstances:

- Failure to serve the defendant before the expiration of the summons, MCR 2.102(E) and MCR 2.504(E)
- Lack of progress based upon failure to take action for more than 91 days, MCR 2.502
- By filing a notice of dismissal before service on the adverse party or by stipulation of the parties, MCR 2.504(A)
- For failure to comply with the court rules or a court order, MCR 2.504(B)
- At the close of plaintiff's proofs in a bench trial, if the plaintiff has shown no right to relief, MCR 2.504(B)(1)

B. Dismissal as to Defendant Not Served - 2.102(E)

If a defendant is not served before the expiration of the summons, the action is deemed dismissed without prejudice as to that defendant unless the defendant has submitted to the court's jurisdiction. MCR 2.102(E)(1) and MCR 2.504(E). The dismissal is without prejudice. MCR 2.102(E)(1). The court may set aside the dismissal on the stipulation of the parties or a motion as provided by MCR 2.102(F). The motion must be filed within 28 days after notice of the order of dismissal was given, or if notice was not given, promptly upon learning of the dismissal. MCR 2.102(F)(3). In addition, the moving party must establish that proof of service was in fact made or the defendant submitted to the court's jurisdiction, MCR 2.102(F)(1), and "proof of service of process was filed or the failure to file is excused for good cause shown." MCR 2.102(F)(2).*

*See Sections 3.7 (summons) and 3.8 (service of process).

C. Dismissal for Lack of Progress - MCR 2.502

Upon notice to the parties, a case may be dismissed for lack of progress if it appears that no steps or proceedings have occurred within 91 days. MCR 2.502(A)(1). However, a notice of proposed dismissal may not be sent if a scheduling order has been entered under MCR 2.401(B)(2) and the time for the scheduled events has not expired or if the case is set for conference, an alternative dispute resolution process, hearing or trial. MCR 2.502(A)(2). If no showing of progress is made, the court may direct the clerk to dismiss the action for lack of progress. MCR 2.502(B)(1). The dismissal is without prejudice. MCR 2.502(B)(1). An action dismissed under MCR 2.502 may be reinstated on motion for good cause. MCR 2.502(C).

D. Voluntary Dismissal - MCR 2.504(A)

The plaintiff may dismiss an action without an order of the court and upon payment of costs by filing a notice of dismissal before service of an answer or motion under MCR 2.116. MCR 2.504(A)(1)(a). Unless otherwise stated in the notice, the dismissal is without prejudice unless the plaintiff "has previously dismissed an action in any court based on or including the same claim." MCR 2.504(A)(1).

A court order is required if the plaintiff seeks to dismiss the action after the service of a responsive pleading or motion. MCR 2.504(A)(2). A dismissal under this court rule is without prejudice unless the order specifies otherwise. MCR 2.504(A)(2)(b).

An action may voluntarily be dismissed by stipulation of the parties. MCR 2.504(A)(1)(b). Unless otherwise stated in the stipulation, the dismissal is without prejudice. MCR 2.504(A)(1).

E. Involuntary Dismissal as a Sanction - MCR 2.504(B)(1)

*See Section 3.58(C) on dismissal as a sanction.

MCR 2.504(B)(1) authorizes a court to enter an involuntary dismissal if a plaintiff fails to comply with a court order. Factors to be considered in determining whether dismissal is the appropriate sanction can be found in *Dean v Tucker,* 182 Mich App 27, 32-33 (1990). Dismissal is a drastic step that should be taken cautiously, so the court must evaluate other available options on the record. *Vicencio v Ramirez,* 211 Mich App 501, 506-507 (1995). The decision is reviewed for abuse of discretion. *Thorne v Carter,* 149 Mich App 90, 93 (1986).*

An involuntary dismissal due to plaintiff's failure to comply with the court rules or any order of the court will operate as an adjudication on the merits unless the order of dismissal provides otherwise. *Carter v SEMTA,* 135 Mich App 261, 265 (1984).

Examples of dismissal as a sanction include:

- Failure to Pay Previously Assessed Fees, Including Attorney Fees. *Sirrey v Danou,* 212 Mich App 159 (1995).
- Failure to Permit Discovery. MCR 2.313 provides a range of sanctions for failure to permit discovery. The options include dismissal. MCR 2.313(B)(2)(c).
- Failure to Appear. A case may be dismissed if the party fails to appear at trial, MCR 2.504(B)(1), or at a pre-trial conference, MCR 2.401(G). A moving party on a motion can be sanctioned for failure to appear for the hearing unless excused by the court. MCR 2.119(E)(4)(b) and (c).

MCR 2.504(B) is silent on whether and how a dismissal as a sanction can be challenged. There are specific provisions in the court rules addressing reinstatement of a case when the dismissal is for failure to serve a party or for lack of progress. MCR 2.504(B)(3) provides that "[u]nless the court otherwise specifies in its order of dismissal, a dismissal under this subrule or a dismissal not provided in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits." If the dismissal is without prejudice, at a minimum, the case can be refiled. If the dismissal is with prejudice, relief may be possible under MCR 2.612 or MCR 2.603(D).

F. Involuntary Dismissal in a Bench Trial - MCR 2.504(B)(2)

*See Section 3.36 on bench trials.

At the close of plaintiff's evidence during a bench trial, the defendant may move for dismissal on the grounds that on the facts and the law plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff or may decline to render judgment until the close of all evidence. See *Begola Services v Wild Bros,* 210 Mich App 636, 639 (1995).*

The standard on this motion is different than that for a directed verdict:

> "Unlike the motion for directed verdict, GCR 1963, 515.1 (now MCR 2.515), a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences. Plaintiff is not given the advantage of the most favorable interpretation of the evidence." *Marderosian v Stroh Brewery,* 123 Mich App 719, 724 (1983). (Citation omitted).

If the court grants the motion, it must make the findings under MCR 2.517(A)(1) so there can be a meaningful appellate review of the court's decision.

G. Effect of Dismissal

Whether the dismissal is with or without prejudice is governed by the court rules and is addressed in discussions above. A dismissal with prejudice is res judicata. See *Rinas v Mercer,* 259 Mich App 63 (2003).*

*See Section 3.5 on res judicata.

H. Standard of Review

The de novo standard of review is applied to dismissal decisions involving a question of law. See *Sands Appliance Services v Wilson,* 231 Mich App 405, 409 (1998), rev'd on other grounds 463 Mich 231 (2000), citing *First of America Bank v Thompson,* 217 Mich App 581, 583 (1996).

When dismissal is used as a sanction, it is reviewed for abuse of discretion. *Vicencio v Ramirez,* 211 Mich App 501, 506 (1995).

The "clearly erroneous" standard applies on review of a dismissal at the close of plaintiff's proofs in a bench trial. *Dart v Dart,* 224 Mich App 146, 154 (1997); *Warren v Juen's Mobile Home Village,* 66 Mich App 386, 389-390 (1976).

3.23 Default and Default Judgments

MCR 2.603 Default and default judgments

MCR 2.612 Relief from judgment or order

A. Default — MCR 2.603(A)

1. Purpose of Default

"The purpose of the default procedure is to keep court dockets current and to expedite the disposal of causes so as to prevent a dilatory or procrastinating defendant from impeding the plaintiff in establishing his or her claim." *Mason v Marsa*, 141 Mich App 38, 41 (1985).

2. Notice of Default Entry

If a party fails to respond as provided by the court rules "and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." MCR 2.603(A)(1). This rule is silent whether the affidavit or other form of request for a default must be served with the request. Arguably, service is not required if there has been no response since neither this court rule or the general rules involving service contain such a requirement. However, "every party who has filed a pleading, an appearance, or a motion must be served with a copy of every paper later filed in the action." MCR 2.107(A)(1). Presumably, this requires service of the request for the default on a party who comes within the language of MCR 2.107(A)(1).

Notice of the entry of default must be given to all parties who have appeared, as well as the defaulted party. MCR 2.603(A)(2). In a Circuit Court case, "[p]roof of service and a copy of the notice must be filed with the court." MCR 2.603(A)(2)(b).

If the defaulted party has not appeared, he must still be given notice either by personal service, ordinary first-class mail at his last known address or place of service, or as the court directs. MCR 2.603(A)(2); *White v Sadler,* 350 Mich 511, 519 (1957); *Huggins v Bohman,* 228 Mich App 84, 87 (1998).

If the plaintiff seeks relief different from or in excess of the amount requested in the complaint, a hearing must be scheduled and notice provided to the defaulted party. MCR 2.601(B); MCR 2.603(B)(1); *Perry v Perry,* 176 Mich App 762 (1989).

3. Hearings on Damages

A default operates as an admission of liability, but not an admission as to damages. The defaulted party has a right to participate at the proceedings on damages. *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512-513 (1981).

If the defaulted party has preserved their right to a jury trial, they have the right to a jury trial on the issue of damages if further proceedings are necessary to determine damages. *Wood v DAIIE*, 413 Mich 573, 583-584 (1982); *Zaiter v Riverfront Complex*, 463 Mich 544, 554 (2001).

The default waives any affirmative defenses. *Haller v Walczak*, 347 Mich 292, 299 (1956). Presumably, this means comparative negligence would not apply to the damages proceedings. In *Rogers v JB Hunt Transport,* 466 Mich 645, 654 (2002), the Supreme Court held that an employer is not precluded from contesting vicarious liability when a default is entered against an employee.

The right to participate after a default does not apply to equitable actions, such as divorce. *Draggoo v Draggoo*, 223 Mich App 415, 427 (1997).

B. Default Judgments — MCR 2.603(B)

1. Notice of Request for Judgment—MCR 2.603(B)(1)

The defaulted party must be given notice of a request for default judgment if:

a) defaulted party has appeared in the action;

b) the judgment seeks relief different in kind or a greater amount than the pleadings;

c) the pleadings do not demand a specific amount of damages.

2. Entry of Default Judgment—MCR 2.603(B)(2) and (3)

a) By Clerk — if amount is supported by an affidavit, and:

– plaintiff's claim is for a sum certain or amount that by computation is certain;

– defendant was defaulted for failure to appear; and,

– defendant is not an infant or incompetent. MCR 2.603(B)(2)(c).

b) By Court — in all other cases. MCR 2.603(B)(3).

c) The clerk mails notice of Entry of Default Judgment to all parties. MCR 2.603(B)(4).

C. Setting Aside Default and Default Judgment

Relief from an entry of default or a default judgment may be sought under MCR 2.603(D) and MCR 2.612(C).

1. Timing

A motion to set aside default judgment must be filed within 21 days after the entry of the default. MCR 2.603(D)(2). However, there is no time limit within which a motion to set aside a default must be filed where the default only has been filed. *ISB Sales Co v Dave's Cakes,* 258 Mich App 520 (2003).

2. Basis

If the motion to set aside a default or default judgment is based on lack of jurisdiction over defendant, it should be brought as a motion for relief from judgment pursuant to MCR 2.612(C)(1)(d), because without jurisdiction over defendant, the court cannot render a valid judgment, and the judgment is void.

If the motion to set aside a default is not based on lack of jurisdiction over defendant, it can be filed any time before entry of default judgment. MCR 2.603(D)(1) and (2). However, once the default judgment has been entered, the defaulted party has 21 days to move to set aside the default judgment under MCR 2.603(D). After 21 days from entry of default judgment, a default judgment may only be set aside if good cause is shown, an affidavit of facts showing a meritorious defense is filed under MCR 2.603(D)(1), and the requirements of MCR 2.612(C) are met. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 47-48 (1989).

The court has discretion in setting aside a default, but that discretion is not unlimited. See *Deeb v Berri*, 118 Mich App 556, 560-561 (1982).

D. Setting Aside Default or Default Judgment Under MCR 2.603(D)

1. Two Conditions

Except when grounded on lack of jurisdiction, a default or default judgment may be set aside only when two conditions are fulfilled:

a) Good cause for failure to make a timely response must be shown.

b) An affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1).

Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 229 (1999); *AMCO Builders & Developers v Team Ace Joint Venture,* 469 Mich 90, 95 (2003).

2. Good Cause

Good cause sufficient to set aside default includes: (a) a substantial defect in the proceeding that resulted in the default, or (b) a reasonable excuse for failure to comply with the requirements that created the default which would result in manifest injustice if the default judgment were allowed to stand. *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 357-358 (1994); *Gavulic v Boyer*, 195 Mich App 20, 24-25 (1992), overruled on other grounds by *Allied Electric Supply Co, Inc v Tenaglia,* 461 Mich 285 (1999); *Marposs v Autocam Corp*, 183 Mich App 166, 171 (1990). Manifest injustice is not a discreet occurrence that can be assessed independently. It is the result that would

occur if a default were allowed to stand after a party has demonstrated good cause and a meritorious defense.

In *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229 (1999), the Supreme Court found that the Court of Appeals blurred the separate requirements of 'good cause' and 'meritorious defense' under MCR 2.603(D)(1). The court held that where MCR 2.603(D) requires a showing of good cause and a meritorious defense to set aside a default or a default judgment, the Court of Appeals erred by concluding that the 'good cause' prong of the rule was satisfied, in part, by a showing of a potentially meritorious defense." *Id.* at 230-234.

To constitute good cause, a substantial defect or irregularity must prejudice the defendant. *Alycekay Co v Hasko Const Co*, 180 Mich App 502, 506-507 (1989).

Provisions for setting aside a default for "good cause" impose a less strenuous showing of reasonable excuse on the party seeking to avoid default than the "excusable neglect" ground for relief from a final judgment provided in MCR 2.612(C)(1)(a). *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 50 (1989); *Kuikstra v Cheers Good Time Saloons, Inc*, 187 Mich App 699, 702 (1991), modified on other grounds, 441 Mich 51 (1992); *Dollar Rent-A-Car v Nidel Const*, 172 Mich App 738, 741 (1988).

3. Meritorious Defense

In order to establish a meritorious defense, the defaulted party must actually demonstrate to the court that his or her defense has merit. The following are examples of meritorious defenses:

1) Plaintiff's complaint is insufficient as a matter of law. *Lindsley v Burke,* 189 Mich App 700, 702-703 (1991) (complaint failed to state claim for relief); *Hunley v Phillips,* 164 Mich App 517 (1987) (complaint failed to plead liability against defendant).

2) The supporting affidavits and documentation challenge a key element of the claim. *Kuikstra v Cheers Good Time Saloons, Inc,* 187 Mich App 699, 703 (1991).

3) The affidavits demonstrate that the defendant is not liable to the plaintiff. *Reed v Walsh,* 170 Mich App 61, 66 (1988); *SNB Bank & Trust v Kensey,* 145 Mich App 765, 771 (1985).

If a party states a strong meritorious defense, a lesser showing of good cause would be required than if the defense were weaker. *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 233-234 (1999).

4. Affidavit of Facts

*But see also Section 3.23(I), below, on standard of review.

"An affidavit of facts showing a meritorious defense must be filed before a default may be set aside for good cause. Good cause and the affidavit are required because the policy of this state is generally to uphold default judgments that have been properly entered." *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 294-295 (1987) (citations omitted).*

The affidavit may not merely state conclusions and must be submitted by one with personal knowledge of the facts showing a meritorious defense. An affidavit of defendant's attorney, who does not possess personal knowledge of the facts put forth in the affidavit, is insufficient. *Hartman v Roberts-Walby Enterprises, Inc*, 17 Mich App 724, 728 (1969); *Asmus v Barrett*, 30 Mich App 570 (1971).

A party need not file an affidavit of facts showing a meritorious defense when there is failure to give the required notice of a request for default judgment, because the failure to give notice constitutes good cause, i.e. a substantial defect in the proceedings, to set aside a default judgment under MCR 2.603(D). *Perry v Perry*, 176 Mich App 762, 770-771 (1989).

5. Costs — MCR 2.603(D)(4)

The court must impose taxable costs and may impose other conditions, including reasonable attorney fees, as prerequisites to setting aside a default.

E. Setting Aside a Default Judgment Under MCR 2.612 — Relief From Judgment or Order

While a default judgment may be set aside pursuant to MCR 2.603(D), as set forth above, relief from a default judgment may also be sought under MCR 2.612(C).

MCR 2.612(C) provides in relevant part:

> "(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.

> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment."

For grounds (a), (b), and (c), a motion must be made within one year. MCR 2.612(C)(2).

In all motions seeking relief from a default or default judgment, the party moving to set aside the default or default judgment must satisfy the good cause and meritorious defense requirements of 2.603(D)(1). If relief is sought under MCR 2.612(C), the moving party would also have to meet any additional grounds required by the pertinent subrule. MCR 2.612(C)(1)(a)–(f).

An attorney's negligence is generally attributable to his client, and as such is not normally grounds to set aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299 (1995).

"A trial court may relieve a party from a final judgment, order, or proceeding on grounds of fraud, misrepresentation, or other misconduct of the adverse party pursuant to MCR 2.612(C)(1)(c). Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations. An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment of fraud is 'of the highest order.'" *Kiefer v Kiefer*, 212 Mich App 176, 179 (1995).

"An order entered without subject-matter jurisdiction may be challenged collaterally and directly. Error in the exercise of jurisdiction may be challenged only on direct appeal. The erroneous exercise of jurisdiction does not void a court's jurisdiction as does the lack of subject-matter jurisdiction. However, error in the exercise of jurisdiction can result in setting aside the judgment." *Grubb Creek Action Comm v Shiawassee County Drain Comm'r*, 218 Mich App 665, 669 (1996) (citations omitted).

F. Separate Action

MCR 2.612(C)(3) allows a party to seek relief from judgment in an independent action on grounds other than extrinsic fraud or non-service. MCR 2.612(C)(3) provides:

> "This subrule does not limit the power of a court to entertain an independent action to relieve a party from a

> judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court."

"The express language of MCR 2.612(C)(3) provides that the provisions in MCR 2.612(C)(1) and (2) in no way 'limit[s] the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding.' Hence a party need not allege fraud or non-service in order to seek relief from judgment in an independent action pursuant to MCR 2.612(C)(3)." *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 584-585 (2002).

If the claim is based on an independent action, the one year period of limitations does not apply. *Kiefer v Kiefer*, 212 Mich App 176, 182 (1995); MCR 2.612(C)(3).

G. Standard of Review

The ruling on a motion to set aside a default or default judgment is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227 (1999).

The policy of this state generally favors the meritorious determination of issues, and therefore encourages the setting aside of defaults. However, whether a default or default judgment should be set aside is within the sound discretion of the trial court and should not be reversed absent clear abuse of that discretion. *Huggins v Bohman*, 228 Mich App 84, 86 (1998); *Gavulic v Boyer*, 195 Mich App 20, 24 (1992); *Alycekay Co v Hasko Const Co*, 180 Mich App 502, 505 (1989); *McGee v Macambo Lounge, Inc*, 158 Mich App 282, 285 (1987); *Borovoy v Bursar Realty Corp*, 86 Mich App 732, 737 (1978). In exercising its discretion, the trial court should balance the public's interest in the finality of judgments against the individual's interest in correcting an injustice. *Mikedis v Perfection Heat Co*, 180 Mich App 189, 203 (1989).

3.24 Summary Disposition

MCR 2.116 Summary disposition

A. Suggestions

- Is the motion timely and properly noticed for hearing?
- What type of motion is it? (Attorneys can be careless in identifying their motion)
- What is the standard for the motion?

- Is discovery complete?
  - Does it matter whether discovery is complete?
- Will amendment cure the problem?

B. Timing — MCR 2.116(D)*

*See the Appendix for a form order denying an untimely motion for summary disposition. However, the court may not have authority to deny an untimely motion under (C)(4), (8), (9), and (10). See (B)(3), in this subsection.

1. Motions Based on (C)(1), (C)(2), and (C)(3)

Must be raised in party's first motion under the rule or in the party's first responsive pleading, whichever is filed first, or they are waived.

2. Motions Based on (C)(5), (C)(6), and (C)(7)

Must be raised in a party's responsive pleading unless grounds are stated in a motion filed under this rule prior to the party's first responsive pleading.

3. Motions Based on (C)(4), (C)(8), (C)(9), and (C)(10)

May be raised at any time. *Versicherungs AG v Lawson*, 254 Mich App 241, 248 (2002).

4. Filing and Service Deadlines — MCR 2.116(G)(1)

Motion, brief, and affidavits, if any, must be filed and served 21 days before hearing date (28 days on an asserted claim — MCR 2.116(B)(2)).

Response, brief, and affidavits, if any, must be filed and served 7 days before hearing.

C. Grounds — MCR 2.116(C)

Motion must specify grounds on which it is based. MCR 2.116(C).

However, "if the moving party has asked for summary disposition under one subpart of the court rule where judgment is appropriate under another subpart, the defect is not fatal...as long as neither party is misled." *Ruggeri Electrical Contracting Co v Algonac*, 196 Mich App 12, 18 (1992) (citations omitted); see also *Blair v Checker Cab Co*, 219 Mich App 667, 670-671 (1996).

D. Standards of Review

1. (C)(1): Lack of Jurisdiction over Person or Property

A motion for summary disposition based on a lack of personal jurisdiction pursuant to MCR 2.116(C)(1) is resolved based on the pleadings and the evidence, including affidavits, submitted by the parties. The burden of establishing jurisdictional facts is on the plaintiff. *Avery v American Honda Motor Car Co*, 120 Mich App 222, 225 (1982).*

*See Section 3.1 on jurisdiction.

2. (C)(2): Insufficient Process

When ruling on a motion brought under MCR 2.116(C)(2), the trial court must consider the pleadings, affidavits, and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Richards v McNamee,* 240 Mich App 444, 448 (2000).

3. (C)(3): Insufficient Service of Process

*See Section 3.8 on service of process.

Summary disposition may be granted where "[t]he service of process was insufficient." MCR 2.116(C)(3). Affidavits, together with any other documentary evidence submitted by the parties must be considered by the trial court. MCR 2.116(G)(5). All factual disputes for the purpose of deciding the motion are resolved in favor of the nonmoving party. See *Jeffrey v Rapid American Corp,* 448 Mich 178, 184 (1995). If the defendant actually receives service of process within the life of the summons, the fact that the manner of service was improper is not grounds for dismissal. MCR 2.105(J)(3); *Hill v Frawley,* 155 Mich App 611 (1986). It is only where there is a failure of service of process that dismissal is warranted. *Holliday v Townley,* 189 Mich App 424, 425-426 (1991).*

4. (C)(4): Lack of Subject Matter Jurisdiction

*See Section 3.1 on jurisdiction.

A motion under MCR 2.116(C)(4) asserts the court lacks jurisdiction of the subject matter. Whether subject matter jurisdiction exists is a question of law for the court. *Dep't of Natural Resources v Holloway Const Co*, 191 Mich App 704, 705 (1991). The Court must consider the pleadings, affidavits, depositions, admissions and documentary evidence submitted by the parties. MCR 2.116(G)(5).*

"When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and the proofs show that there was no genuine issue of material fact." *Sun Communities v Leroy Twp,* 241 Mich App 665, 668 (2000). Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust his administrative remedies. *Citizens for Common Sense in Gov't v Attorney General,* 243 Mich App 43, 50 (2000).

5. (C)(5): Lack of Legal Capacity to Sue

A motion under MCR 2.116(C)(5) asserts the defense that a party lacks the legal capacity to sue. In considering a motion on this subrule, the trial court must consider the pleadings, depositions, admissions, affidavits and other documentary evidence. *Wortelboer v Benzie County*, 212 Mich App 208, 213 (1995).

6. (C)(6): Another Action Exists Between the Same Parties Involving the Same Claim

A motion for summary disposition pursuant to MCR 2.116(C)(6) is based on the grounds that an action may be dismissed if another action has been initiated between the same parties involving the same claim. The purpose of this rule is to prevent endless litigation of the same claim by the same parties. See Justice Riley's concurring opinion in *Rowry v University of Michigan*, 441 Mich 1, 20 (1992).*

*See Section 3.5 on res judicata and Section 3.62 on release.

7. (C)(7): Claim Is Barred by Prior Judgment, Immunity Granted by Law, Statute of Limitations, Statue of Frauds, or Other Disposition Before the Commencement of Claim

"A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116 (C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119 (1999), citing *Patterson v Kleiman*, 447 Mich 429, 434, n 6 (1994).*

*See Section 3.5 on res judicata.

8. (C)(8): Failure to State a Claim upon Which Relief Can Be Granted

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Dolan v Continental Airlines*, 454 Mich 373, 380 (1997). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corr*, 439 Mich 158, 162-163 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. A mere statement of a pleaders' conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). See also *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

9. (C)(9): Failure to State a Valid Defense

A motion for summary disposition under MCR 2.116(C)(9) tests the legal sufficiency of a pleaded defense to determine whether the defense is so clearly untenable as a matter of law that no factual development could deny the other party's right to recover. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730 (1991). When deciding a motion under this subrule, a court may consider only the parties' pleadings. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47

(1990). Summary disposition is inappropriate under this subrule when a material allegation of the complaint is categorically denied. *Fancy v Egrin*, 177 Mich App 714, 724 (1989).

10. (C)(10): No Genuine Issue as to Any Material Fact Exists, and Moving Party Is Entitled to Judgment or Partial Judgment as a Matter of Law

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

"A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 120 (1999).

"Instead, a litigant opposing a properly supported motion for summary disposition under this subrule must present substantively admissible evidence to the trial court prior to its decision on the motion, which creates a genuine issue of material fact." *Sprague v Farmers Ins Exch,* 251 Mich App 260, 265 (2002).

"The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121 (1999) (citations omitted).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals,* 205 Mich App 418, 420 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237 (1993); see also *Quinto v Cross & Peteus Co*, 451 Mich 358, 362-363 (1996).

The court must determine whether the kind of record that might be developed, giving the benefit of reasonable doubt to nonmovant, would leave open an issue of fact on which reasonable minds might differ. *Farm Bureau Ins v Stark*, 437 Mich 175, 184-185 (1991), overruled by *Smith v Globe Life Ins Co,* 460 Mich 446, 455 n 2 (1999).

A party may not raise an issue of fact by submitting an affidavit that contradicts clear and unequivocal testimony or answers to interrogatories. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155 (1997), *Atkinson v City of Detroit*, 222 Mich App 7, 11 (1997), and *Kaufman & Payton PC v Nikkila*, 200 Mich App 250, 257 (1993). The court may disregard such testimony. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 233-234 (1991).

The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2 (1999) and *Maiden v Rozwood*, 461 Mich 109, 121 (1999).

The court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. *Morris v Allstate Ins Co*, 230 Mich App 361, 364 (1998).

An affidavit that simply states an expert's opinion, without providing any scientific or factual support, may be insufficient to create a genuine issue of material fact. See *Travis v Dreis & Krump Mfg Co,* 453 Mich 149, 175 (1996). Travis involved an affidavit that "merely parrots the language of the legal test."

Contract Interpretation. Summary disposition under MCR 2.116(C)(10) may be granted when the issues raised are merely those of contractual interpretation rather than factual dispute. *Allstate Ins Co v Freeman*, 432 Mich 656 (1989).

E. Proofs Supporting or Opposing Motions — MCR 2.116(G)

Affidavits, depositions, admissions and other documentary evidence may be used to support or oppose some defenses or objections.

1. Motions Based on (C)(8) and (C)(9)

Proofs are not allowed and motions must be decided only on the pleadings. MCR 2.116(G)(5).

2. Motions Based on (C)(10)

a) A motion based on (C)(10) must specifically identify the issues as to which there is no genuine issue as to any material fact. MCR 2.116(G)(4).

b) Proofs are required. It is also required when the grounds asserted do not appear on the face of the pleadings. MCR 2.116(G)(3).

c) If the motion is properly made and supported, the adverse party must, by affidavit or otherwise, set forth specific facts showing there is a genuine issue for trial. If the adverse party fails to do so, judgment, if appropriate, shall be entered. MCR 2.116(G)(4).

d) In general, motions based on (C)(10) should not be granted until discovery is closed.

3. Motions Based on All Other Grounds

Proofs are permissive. MCR 2.116(G)(2).

4. Unavailability of Affidavits — MCR 2.116(H)

A party may present an affidavit to establish that the facts necessary to support the party's position are known only to persons whose affidavits a party cannot procure.

5. Discovery

Generally, summary disposition granted before discovery on a disputed issue is complete is considered premature. *Kassab v Michigan Basic Property Ins Ass'n*, 185 Mich App 206, 216 (1990), rev'd in part 441 Mich 433 (1992). However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.* See *Prysak v RL Polk Co*, 193 Mich App 1, 11 (1992).

F. Disposition — MCR 2.116(I)

Includes judgment for moving party, judgment for nonmoving party, immediate trial or mandatory opportunity to amend pleadings, if justified, and if granted. MCR 2.116(C)(8)-(10).

1. Judgment for Moving Party

If the pleadings show a party is entitled to judgment as a matter or law, or other proofs show there is no genuine issue of material fact, court must render judgment without delay. MCR 2.116(I)(1).

2. Judgment for Non-Moving Party

The court may render judgment in favor of the opposing party, if it appears that the opposing party is entitled to judgment. MCR 2.116(I)(2).

3. Immediate Trial

The court may order immediate trial to resolve any disputed issue of fact if the grounds asserted are (C)(1) - (C)(6), or (C)(7) if a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on (C)(7) and a jury trial has been demanded, the court must have a jury trial on the issues raised by the motion to which there is right to trial by jury. MCR 2.116(I)(3).

4. Amendment of Pleadings

If a motion is based on (C)(8), (C)(9), or (C)(10), the court shall give parties an opportunity to amend their pleadings unless evidence before the court shows that amendment would not be justified. MCR 2.116(I)(5).

Where summary disposition has been entered against a party, he can only amend his complaint by leave of the court. *Steel v Cold Heading Co*, 125 Mich App 199, 203 (1983); *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 288-289 (1986).

G. Standard of Review

Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337 (1998).

An order granting summary disposition under the wrong court rule may be reviewed under the correct rule. *Shirilla v Detroit,* 208 Mich App 434, 437 (1995), citing *Ginther v Zimmerman*, 195 Mich App 647, 649 (1992).

Part III—Discovery (MCR Subchapter 2.300)

This part addresses common discovery issues. See Section 2.30 on use of depositions and interrogatories as evidence.

3.25 Discovery Motions

MCR 2.302 General rules governing discovery

MCR 2.313 Failure to provide or permit discovery; sanctions

A. Suggestions

- Determine whether routine or complex. Does motion address failure to respond or the response? If the motion addresses failure to respond, set deadline and possible consequences.
- If hearing is on objections to interrogatories, or allegations of evasive or incomplete answers, require submission of both interrogatories and answers in advance, and require specificity in motion.
- Build a record.
- Consider in camera review.
- Consider alternative discovery methods beyond those specified in MCR. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618 (1998).

B. Scope of Discovery

Michigan follows the open, broad discovery policy, permitting liberal discovery of any matter not privileged and relevant to the subject matter in the pending case. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614 (1998); MCR 2.302(B)(1).

Discovery rules are to be liberally construed to further the ends of justice. *Domako v Rowe*, 438 Mich 347, 359 (1991). See also *Daniels v Allen Indus, Inc*, 391 Mich 398, 404-405 (1974); *Carr v Pott (In re Pott)*, 234 Mich App 369, 376 (1999). The purpose of discovery is simplification and clarification of issues. *Domako, supra* at 360. Restricting parties to formal methods of discovery would not aid in the search for truth. *Id.*

Discovery of financial assets in the course of a civil action is outside the scope allowed by MCR 2.302. *Bauroth v Hammoud*, 465 Mich 375 (2001).

C. Motions to Compel — MCR 2.313

A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been an abuse of that discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343 (1993)(citations omitted).

D. Sanctions

1. Original motion to compel — MCR 2.313(A)(5)

Reasonable expenses, including attorney fees, may be awarded unless opposition to or making of motion was substantially justified or other circumstances make award unjust. Expenses may be apportioned. Both the

party and the attorney may be sanctioned. *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 88-89 (1999).

2. Failure to obey order compelling discovery — MCR 2.313(B)(2)

(a) Facts may be taken as established.

(b) Disobedient party may not support or oppose designated claims or defenses or introduce designated matters in evidence.

(c) Strike pleadings or parts of pleadings, stay further proceedings until order is obeyed, dismiss action or parts of it, enter judgment by default.

(d) Contempt of court (except order to submit to physical or mental examination).

(e) Reasonable expenses, including attorney fees, unless failure is substantially justified or other circumstances make award unjust.

3. Supplementation of answers to interrogatories by providing the names of expert witnesses. MCR 2.302(E)(1)(a)(ii).

Pursuant to MCR 2.303(E)(2), failure to provide such supplementation, even without an order compelling discovery, may result in imposition of the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b). MCR 2.313(B)(2)(b) authorizes an order refusing to allow the disobedient party to support designated claims or prohibiting the party from introducing designated matters into evidence. *LaCourse v Gupta*, 181 Mich App 293, 296 (1989); see also *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 88 (2000).

4. Factors when considering sanctions. In *Dean v Tucker*, 182 Mich App 27, 32-33 (1990), the Court directed these factors to be considered in determining an appropriate sanction:

(a) whether the violation was willful or accidental;

(b) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);

(c) the prejudice to the defendant;

(d) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice;

(e) whether there exists a history of a party's engaging in deliberate delay;

(f) the degree of compliance by the party with other provisions of the court's order;

(g) an attempt by the plaintiff to timely cure the defect;

(h) whether a lesser sanction would better serve the interests of justice;

(i) this list should not be considered exhaustive.

5. An evidentiary hearing may be required. See *Traxler v Ford Motor Co*, 227 Mich App 276, 288 (1998).

E. Motions for Protective Orders — MCR 2.302(C)

1. Basis

a) Good cause shown. MCR 2.302(C).

b) Justice requires a protective order to protect party or person from annoyance, embarrassment, oppression or undue burden or expense. MCR 2.302(C).

2. Options Under MCR 2.302(C)

a) No discovery.

b) Discovery on specified terms and conditions.

c) Another method of discovery.

d) Limit scope of discovery.

e) Limit person present at discovery.

f) Seal deposition, to be opened only by order of court.

g) Deposition for discovery purposes only; not admissible, except for impeachment.

h) Nondisclosure of trade secrets or confidential commercial information.

i) Simultaneous filing of specified documents in sealed envelopes, to be opened as directed by the court.

F. Award of Expenses — MCR 2.302(c) and 2.313(A)(5)

Reasonable expenses, including attorney fees, unless failure is substantially justified or other circumstances make award unjust. The court may apportion expenses.

G. Alternative Forms of Discovery

The court may have discretion to order discovery by methods other than those specifically mentioned in the Court Rules. See MCR 2.302(B)(4)(a)(iii) and *Reed Dairy Farm v Consumer Power Co*, 227 Mich App 614, 616-618 (1998).

H. Special Master

The Circuit Court does not have authority to delegate its judicial functions to a special master. *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116 (1996); *Oakland County Pros v Beckwith*, 242 Mich App 579 (2000). This reasoning would preclude the use of special masters to resolve discovery issues.

I. Standard of Review

Decisions on discovery motions are reviewed for an abuse of discretion. *Linebaugh v Sheraton Michigan Corp,* 198 Mich App 335, 343 (1993).

3.26 Request for Admissions

MCR 2.312 Request for admissions

A. Purpose

The purpose of MCR 2.312 is "to limit areas of controversy and save time, energy, and expense which otherwise would be spent in proffering proof of matters properly subject to admission." *Radtke v Miller Canfield Paddock & Stone*, 209 Mich App 606, 616 (1995). The mere fact that the matter was proved at trial does not establish the denial was unreasonable. *Greenspan v Rehberg*, 56 Mich App 310, 329 (1974).

B. Scope

MCR 2.312(A) permits written requests to admit the truth of a matter within the scope of discovery.

A party may request another party to admit the truth of the matter that relates to statements or opinions of fact. MCR 2.312(A). However, requesting that the party admit to the basis of their claim is not a proper subject for admission. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 456-458 (1995).

C. Response

"A party served with such a request has several options. The party may concede the matter either by express admission or by doing nothing, in which event the matter is deemed admitted after a specified period. The party also may deny the matter, in whole or in part, explain why it neither can admit nor deny the matter, or object to the request". *Radtke v Miller Canfield*, 453 Mich 413, 419 (1996).

An admission is conclusive unless the court permits amendment or withdrawal. MCR 2.312(D)(1). The court has discretion to permit amendment of an admission for good cause. MCR 2.312(D)(1). *Medbury v Walsh*, 190 Mich App 554, 556 (1991). If the party does not respond or object, the matter is admitted. MCR 2.312(B)(1); *Medbury, supra.*

The trial judge is to balance three factors in determining whether or not to allow a party to file late answers to an opposing party's request for admissions: (1) whether it will aid in the presentation of the action; (2) whether or not the other party would be prejudiced by a late answer; and (3) the reason for the delay. *Janczyk v Davis*, 125 Mich App 683, 692-693 (1983).

D. Effect

Admissions under MCR 2.312 are judicial admissions, not evidentiary admissions. The effect is like a concession in a pleading or a stipulation. *Radtke v Miller Canfield Paddock & Stone*, 453 Mich 413, 420-421 (1996). The admissions must be narrowly construed. *Hilgendorf v St John Hosp and Med Center Corp*, 245 Mich App 670, 690 (2001). The admissions can be considered for purposes of ruling on a motion for summary disposition. *Employers Mut Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 61-62 (1991).

The procedures in MCR 2.312 are not self-executing but require that the party seeking to rely upon any admission bring the issue to the trial court's attention before the request may be deemed admitted. *Radtke, supra* at 421 n 7.

E. Standard of Review

The court has the discretion to allow a party to file late answers or even to amend or withdraw the answers. *Janczyk v Davis,* 125 Mich App 683, 691 (1983).

3.27 Request for Documents

MCR 2.310 Requests for production of documents

MCR 2.314 Discovery of medical information concerning party

A. Generally

MCR 2.310 covers the production of documents and things, as well as the entry on land. There is a separate rule for medical records. See MCR 2.314.*

*See Section 3.28 for discussion of discovery of privileged information.

B. Scope

The scope of MCR 2.310 is limited to matters within the scope of discovery under MCR 2.302(B) that are in the possession, care, custody, or control of the person on whom the request is served.

C. Requests on Parties

A request can be made of a party with or after the complaint has been served. The request must list the items requested and describe each with reasonable particularity. The party served must serve a written response within 28 days (42 days after complaint), although the court may lengthen or shorten the response time. The documents should be produced as kept in the usual course of business. MCR 2.310(C).

In the absence of a response, the requesting party can move for an order under MCR 2.313(A).

The party to whom the request is submitted may seek a protective order under MCR 2.302(C).

D. Requests on Non-Parties

Requests may be served on non-parties any time after an action is commenced, see MCR 2.306(A)(1), or by leave of the court. The request must list and describe the items with reasonable particularity, specify a reasonable time, place, and manner, and inform the person that an order may be sought to compel compliance. MCR 2.310(D).

If the person does not permit inspection or entry within 14 days after the request is served, the party may file a motion to compel. The requesting party must pay reasonable costs associated with the entry or inspection. Independent action against the non-complying individual is not precluded.

E. Good Cause Not Required

The Michigan Court Rules do not impose a requirement of good cause for the discovery of relevant, nonprivileged documents or things. *Davis v O'Brien*, 152 Mich App 495 (1986).

F. Privilege Assertion or Waiver

A party with a valid privilege may assert it to prevent discovery. MCR 2.302(B)(1). A privilege that is not timely asserted is waived. MCR 2.314(B)(1). If privilege is asserted, the party may not thereafter present evidence relating to the medical history or condition. MCR 2.314(B).

G. Standard of Review

A trial court may exercise its discretion to order a party to produce relevant, nonprivileged documents. *Dierickx v Cottage Hosp Corp*, 152 Mich App 162 (1986).

3.28 Privileged Materials

MCR 2.302 (B), (C) Scope of discovery; protective orders

A. In Camera Review

*See Sections 2.2 (motions in limine) and 2.10 (privileges).

The Court may be asked to conduct an in camera inspection of documents or witnesses. The Court may utilize in camera review to inspect or screen questionable evidence or testimony which as a whole may have otherwise been inadmissible. MCR 2.302(B),(C).*

B. Common Claims of Privilege

See MCR 2.302(B)(1), (3) and (4).

1. Medical Records

MCR 2.314 addresses the mechanism to be used for the discovery of medical information if the condition of a party is in controversy. Medical information of non-parties is not discoverable under this rule. MCR 2.314(E).

Custodians of medical information shall comply with a proper request within 28 days. MCR 2.314(D)(1). The custodian may comply by making the information reasonably available. The requesting party must pay the custodian reasonable reimbursement in advance for the expense of complying. MCR 2.314(D)(5). If the custodian does not comply, a subpoena may be issued under MCR 2.305(A)(2). MCR 2.314(D)(6).

2. Hospital Records

A claim that certain hospital documents are not privileged may be presented to the Court for review. An in camera hearing is proper to review such documents in the possession of the hospital and requested by the plaintiff. In *Monty v Warren*, 422 Mich 138, 146 (1985), it was found that the review should not be conducted in open court. To guard against the disclosure of privileged information it is necessary to conduct the hearing in camera.

In determining whether privilege applies to certain hospital documents, two sections of the Public Health Code may play a role. MCL 333.20175(8) and MCL 333.21515 both state essentially the same thing:

> "[T]he records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena." MCL 333.21515.

In *Dye v St John Hosp and Med Center*, 230 Mich App 661 (1998), the court addressed whether materials in a "credentials file" were subject to disclosure under MCL 333.21515 or MCL 333.20175, concluding that the information was protected from disclosure. *Dye, supra* at 668-669.

The court in *Dye* also addressed whether the language of MCL 331.531 et seq., mandated disclosure of information by a review entity. The plaintiff argued that an application for staff privileges fell within MCL 331.532(2), which states:

> "The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
>
> ....
>
> > (e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility." *Dye, supra* at 673 (citations omitted).

The court concluded that:

> "[S]ubsection 2(e) refers only to the release of information for the purpose of assisting a health care facility in determining whether a health care professional has the qualifications, competence, and performance needed to be selected and appointed to a medical staff position....[I]t has nothing to do with the release of information to a plaintiff in a malpractice or negligent hiring lawsuit." *Id.*

3. Personnel Files

Disclosure of personnel files is governed by the Bullard-Plawecki Employee Right to Know Act. MCL 423.501 et seq. The Act defines "personnel records" as:

> "[A] record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer,

> additional compensation, or disciplinary action. A personnel record shall include a record in the possession of a person, corporation, partnership, or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision. A personnel record shall not include:
>
> > (i) Employee references....
> >
> > (ii) Materials relating to the employer's staff planning....
> >
> > (iii) Medical reports and records made or obtained by the employer....
> >
> > (iv) Information of a personal nature about a person other than the employee....
> >
> > (v) Information that is kept separately from other records....
> >
> > (vi) Records limited to grievance investigations which are kept separately....
> >
> > (vii) Records maintained by an educational institution....
> >
> > (viii) Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record...." MCL 423.501(c).

Information that is not included in the personnel file, but should have been may not be used by an employer in a judicial or quasi-judicial proceeding. MCL 423.502. Employees may review their record after written request. MCL 423.503. Employers may charge for a copy of the personnel file. MCL 423.504.

An employer may not disclose disciplinary reports or reprimands without written notice to the employee. MCL 423.506. An employer shall review a personnel file before releasing information to a third party. MCL 423.507.

The Bullard Plawecki Act applies to non-public employers and to public entities, such as schools, that are covered by the Freedom of Information Act. MCL 15.231. See also *Bradley v Saranac Community Schools Bd of Educ*, 216 Mich App 79 (1996).

4. Trade Secrets

Discovery of trade secrets is generally addressed under MCR 2.302(C)(8) which states:

> "(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> > (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. MCR 2.302(C)(8)."

5. Work Product

Discovery of documents prepared in anticipation of litigation is governed by MCR 2.302(B)(3). Insurance agreements are discoverable. MCR 2.302(B)(2). Statements given by a party or witness to counsel shortly after an incident relevant to pending litigation may be discoverable if the statements could not be reproduced without undue hardship. *Lynd v Chocolay Twp*, 153 Mich App 188 (1986).

C. Standard of Review

The court has discretion whether to conduct an in-camera examination. See *Ostoin v Waterford Twp Police Dep't,* 189 Mich App 334, 340 (1991).

3.29 Independent Medical Examinations

MCL 600.1445 Physical examination of person ordered by court

MCR 2.311 Physical and mental examinations

A. Generally

Whenever the mental or physical condition of a party, or of a person in the custody of or under the control of a party is in controversy, the court may order the party to submit to an examination, or to produce the person in the party's custody for examination. MCR 2.311(A); *Brewster v Martin Marietta, Inc*, 107 Mich App 639 (1981).

The order may be entered only on a motion for good cause with notice to the person to be examined and all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination. MCL 600.1445(1); MCR 2.311(A).

B. Physician's Report

A copy of the report and findings by the physician shall be provided to the person examined, MCL 600.1445, and also to the party causing the examination, MCR 2.311(B). The party causing the examination is entitled to a copy of all other similar examinations. MCR 2.311(B)(2).

If the parties do not deliver the reports as provided, the court may order the physician to appear for a discovery deposition. MCR 2.311(B)(3).

C. Privilege

By requesting or obtaining a report of an examination ordered pursuant to MCR 2.311, the person examined waives any privilege s/he may have in that action, or any action involving the same controversy or mental or physical condition. MCR 2.311(B)(4).

D. Standard of Review

The Court will not reverse a trial court's denial of an order requiring the mental or physical examination of a party or its agent unless there has been an abuse of discretion. *Brewster v Martin Marietta, Inc,* 107 Mich App 639, 643 (1981).

3.30 Disclosure of Witnesses

MCR 2.401 Pretrial proceedings; conferences; scheduling orders

A. Witness Lists

Witness lists are an element of discovery. *Grubor Enterprises v Kortidis*, 201 Mich App 625, 628 (1993). The purpose of witness lists is to avoid "trial by surprise." *Id.*

The court can require the parties to file and serve witness lists. MCR 2.401(I)(1). The list should include the witness' name and address, whether the witness is an expert, and the field of expertise. *Id.*

B. Amendment of Witness Lists

Whether to permit an amendment to the witness list is within the trial court's discretion. *Jernigan v Gen Motors Corp*, 180 Mich App 575, 584 (1989). Such a decision should not be reversed absent an abuse of discretion. *Id.*

The party seeking to amend the witness list must state good cause for the request. *Id.*

C. Sanctions for Failure to File Witness List

The court may order that any witness not listed be prohibited from testifying at trial except upon good cause shown. MCR 2.401(I)(2).

While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. *Dean v Tucker*, 182 Mich App 27, 32 (1990); *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90-91 (2000). The mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction. *Dean v Tucker,* 182 Mich App 27, 32 (1990).

Certain factors should be considered in determining the appropriate sanction. These factors include, but are not limited to:

(1) whether the violation was willful or accidental;

(2) the party's history of refusing to disclose witnesses;

(3) the prejudice to the defendant;

(4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice;

(5) whether there exists a history of plaintiff's engaging in deliberate delay;

(6) the degree of compliance by the plaintiff with other provisions of the court's order;

(7) an attempt by the plaintiff to timely cure the defect; and

(8) whether a lesser sanction would better serve the interests of justice.

Id. at 32-33.

D. Standard of Review

The decision to permit the amendment of the witness list or exclude a witness not listed on the party's witness list is reviewed for an abuse of discretion. See *Jernigan, supra* and *Gillam v Lloyd,* 172 Mich App 563, 584 (1988).

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.31 Pretrial Conferences

MCR 2.401 Pretrial procedures; conferences; scheduling orders

A. Scheduling Conference — MCR 2.401(B)

1. Purposes — MCR 2.401(B)

a) To establish control of case.

b) To consider whether jurisdiction and venue are proper or whether the case is frivolous.

c) To establish deadlines for:

– Witnesses

– Discovery

– Amendment of Pleadings

– Summary Disposition Motions

– Case Evaluation/Alternative Dispute Resolution

– Trial

2. Timing — MCR 2.401(A)

a) At any time. Court may schedule or set at request of party. Must give notice. Should be set soon after answer is filed.

b) 15-30 minutes.

3. Participants — MCR 2.401(E) and (F)

a) Attorneys only. MCR 2.401(E).

b) In chambers or by conference call. See MCR 2.402.

4. Suggested Preparation

a) Review file for:

– Age of case

– Nature/complexity of case

– Number and location of parties

– Number and location of witnesses

– Extent of necessary discovery

– Legal issues

5. Scheduling Order — MCR 2.401(B)(2)

a) Should set deadlines and address likely issues.

b) The court can enter a scheduling order without a conference but must reconsider the order if a party makes a request in 14 days. MCR 2.401(B)(2)(c).

B. Pretrial Conference — MCR 2.401(C)

1. Purposes

a) To establish trial procedures for:

– Voir dire

– Exhibits (exchange list; mark in advance)

– Deposition cleanup (motion in limine)

– Admissions

– Proposed jury instructions or findings of fact

– Stipulated facts

b) To identify/simplify the issues. May require trial brief. MCR 2.401(D).

c) To identify witnesses actually testifying.

d) To discuss estimated length of trial.

e) To discuss settlement.

f) To consider alternative dispute resolution. MCR 2.410.

2. Timing

a) 3-4 weeks before trial.

b) 15 minutes to one hour depending on the case.

3. Participants — MCR 2.401(F) and (G)

a) Attorneys, parties, representatives of lien holders, representatives of insurance carriers, or other persons. MCR 2.401(E),(F), and 2.506(A)(2). The court cannot designate who will be the insurer's representative. *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 422 (1995). But see MCR 2.401(F)(2) which provides that the court may require the availability of a specified individual but authorizes the use of a substitute with the same information and authority. The court's

order may specify whether the availability is to be in person or by telephone.

A party represented by counsel is not required to be present for a civil proceeding unless they have been ordered to appear. *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517-518 (1989).

A party may be defaulted or a dismissal may be ordered for the failure of the party, the party's attorney or representative to attend unless manifest injustice would result or the failure was not due to the culpable negligence of the party or the party's attorney. MCR 2.401(G).

A party cannot be defaulted based solely on a non-party insurance company's refusal to make a settlement offer. *Henry v Prusak*, 229 Mich App 162, 170 (1998).

4. Suggested Preparation

a) Review file for:

– Witness lists.

– Pending motions.

– Offers of judgment.

b) Conference Summary, if appropriate — MCR 2.401(C)(2).

c) Sanctions for Failure to Appear — MCR 2.401(G).

5. Order—MCR 2.401(C)(2)

See Order Scheduling Settlement Conference in Appendix.

C. Settlement Conference

1. Timing

a) Typically 1-14 days before trial but may be set at any time.

b) 15 minutes - all day depending on the case.

c) Determine scope at pretrial conference.

2. Participants

a) Attorneys, parties, representatives of lien holders, representatives of insurance carriers, or other persons. MCR 2.401(E),(F), and 2.506(A)(2). The court cannot designate who will be the insurer's representative. *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 422 (1995). But see MCR 2.401(F)(2) which provides that the court may require the availability of a specified individual but authorizes the use of a substitute with the same information and authority. The court's

order may specify whether the availability is to be in person or by telephone.

A party represented by counsel is not required to be present for a civil proceeding unless they have been ordered to appear. See *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517-518 (1989).

A party may be defaulted or a dismissal may be ordered for the failure of the party, the party's attorney or representative to attend unless manifest injustice would result or the failure was not due to the culpable negligence of the party or the party's attorney. MCR 2.401(G).

A party cannot be defaulted based solely on a non-party insurance company's refusal to make a settlement offer. *Henry v Prusak*, 229 Mich App 162, 170 (1998).

D. Post-Trial Settlement Conference

Whether to hold a post-trial settlement conference is not addressed by the court rules. Such a conference provides an opportunity for discussion of settlement after trial but before appeal. The author suggests scheduling a status conference if an appeal is being considered.

E. Standard of Review

A dismissal under MCR 2.401(G) is reviewed for an abuse of discretion. *Schell v Baker Furniture Co*, 232 Mich App 470, 474 (1998).

3.32 Offer of Judgment

MCR 2.405 Offers to stipulate to entry of judgment

A. Process

MCR 2.405 provides a formal process for making offers and counteroffers. There is the potential for sanctions if an offer or counter offer is rejected and the offeror receives a more favorable decision.

B. Purpose

"The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *Gudewicz v Matt's Catering*, 188 Mich App 639, 643 (1991), citing *Sanders v Monical Machinery,* 163 Mich App 689, 692 (1987). See also *Auto Club Ins Ass'n v Gen Motors Corp*, 217 Mich App 594, 598 (1996).

C. Amount

The offer must be for a sum certain. MCR 2.405(A)(1). It has been held the offer may be payable in installments. *Central Cartage Co v Fewless*, 232 Mich App 517, 530-531 (1998).

D. Timing

An offer of judgment can be made no less than 42 days before trial. MCR 2.405(B). If the offeror waits until the last day to make an offer, the offeree can still make a counter offer. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 639-641 (1997).

E. Sanctions

The payment of taxable costs and reasonable attorney fees is required, except the "court may, in the interest of justice, refuse to award an attorney fee." MCR 2.405(D). The "interest of justice" exception is a narrow one. For a discussion of possible circumstances where it might or might not apply, see *Luidens v 63rd District Court*, 219 Mich App 24, 31-36 (1996). A "reasonable" refusal is insufficient to deny attorney fees. *Id.* at 33; *Butzer v Camelot Hall Convalescent Centre, Inc*, 201 Mich App 275, 278-279 (1993).

On the other hand, a de minimus offer of judgment made early in the case in hope of triggering sanctions may come under the "interest of justice" exception. *Stitt v Holland Abundant Life Fellowship (On Remand),* 243 Mich App 461, 476 (2000).

F. Relation to Case Evaluation

If a case is submitted to case evaluation, costs under MCR 2.405 cannot be awarded, unless the award is not unanimous. MCR 2.405(E).*

*See Section 3.33 on case evaluation.

If there is a rejection of both the case evaluation award and a rejection of an offer of judgment, the cost provisions of the rule under which the later rejection occurred control. *JC Building Corp II v Parkhurst Homes, Inc,* 217 Mich App 421, 426 (1996).

G. Standard of Review

Generally a trial court's decision to award offer of judgment sanctions is reviewed for an abuse of discretion. *JC Building Corp II v Parkhurst Homes, Inc,* 217 Mich App 421, 426 (1996).

3.33 Case Evaluation

MCR 2.403 Case evaluation

A. Scope and Applicability — MCR 2.403(A)

Any civil action in which relief sought is primarily money damages or division of property. MCR 2.403(A)(1).

Mandatory for tort cases in circuit court under MCL 600.4901-600.4923, unless the court finds case evaluation would be inappropriate.

District court cases may be submitted to case evaluation. MCR 2.403(A)(3).

B. Selection of Cases — MCR 2.403(B)

Cases may be sent to case evaluation:

- on written stipulation by the parties;
- on written motion by a party; or,
- on the judge's own initiative.

C. Objections to Case Evaluation — MCR 2.403(C)

Written motion and notice of hearing must be filed and served within 14 days after notice of order assigning case to case evaluation.

Motion must be set for hearing within 14 days after it is filed.

Timely motion must be heard before case is submitted to case evaluation.

D. Decision — MCR 2.403(K)

Evaluation is in writing and is made within 14 days after hearing. Includes separate award as to plaintiff's claim against each defendant and as to each cross-claim, counterclaim and third party claim.

If evaluation is not unanimous, evaluation must so indicate.

In certain tort cases, if panel unanimously finds a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation.

If a party's claim or defense was found to be frivolous under MCR 2.403(K)(2), he may file a motion within 14 days requesting the court to review that finding. MCR 2.403(N)(2).

E. Acceptance or Rejection of Evaluation — MCR 2.403(L)

Failure to file a written acceptance or rejection within 28 days constitutes a rejection.

A party must either accept or reject the entire evaluation as to each opposing party, even it there are separate awards on multiple claims.

If both parties accept, the case is settled. See *Joan Automotive Indus, Inc v Check,* 214 Mich App 383, 388-390 (1995). Typically, the case is dismissed by stipulation, but MCR 2.403(M) provides for entry of a judgment.

Query: The court may have authority to extend or shorten case evaluation deadlines under MCR 2.108(E) and 2.612(C)(1), and the court might be able to shorten the response time. See *Stewart v Poole*, 196 Mich App 25, 29-30 (1992), rev'd on other grounds 443 Mich 863 (1993), in which the Supreme Court commented that it did not reach the question whether the circuit court has the authority to shorten the period stated in MCR 2.403(L)(1).

F. Post-Rejection Proceedings — MCR 2.403(N)

If the evaluation is rejected, the action proceeds to trial. MCR 2.403(N)(1).

If a claim or defense is found to be frivolous, the party may request court review by motion, or the party must post a bond. MCR 2.403(N)(2) and (3).

The evaluation cannot be revealed to the judge in a non-jury case. MCR 2.403(N)(4). See also *Bennett v Medical Evaluation Specialists*, 244 Mich App 227 (2000) and *Cranbrook Professional Building v Pourcho*, 256 Mich App 140 (2003).

G. Motion for Setting Aside Case Evaluation

A trial court has discretion to set aside an acceptance of the award both before and after entry of a judgment upon the award. *Reno v Gale*, 165 Mich App 86, 92-93 (1987); *Muntean v City of Detroit,* 143 Mich App 500, 507 (1985). The court also has discretion to set aside a rejection of the award. *State Farm Mutual Auto Ins Co v Galen*, 199 Mich App 274, 277-279 (1993).

A trial court's decision to grant or deny relief will be reviewed only for an abuse of discretion. See *Muntean, supra* at 507-511, for discussion of judicial discretion. Judgment on acceptance shall be set aside only if failure to do so will result in substantial injustice. *Hauser v Roma's of Michigan*, 156 Mich App 102, 104-105 (1986).

Court of Appeals upheld trial court's refusal to set aside acceptance of mediation based on counsel's failure to timely reject (under old rule). *Hauser, supra*.

Court of Appeals upheld trial court's grant of a motion to set aside acceptance of mediation based on counsel's failure to timely reject (under old rule). *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508 (1989).

Court of Appeals upheld trial court's refusal to set aside acceptance of case evaluation based on claim of newly discovered evidence. *Hauser, supra*; *Pelshaw v Barnett*, 170 Mich App 280, 283 (1988).

Once a party has notified the case evaluation clerk of its acceptance or rejection of a case evaluation award, it is not entitled to alter its decision within the 28-day period. *Castillo v Alexander*, 171 Mich App 679, 681 (1988).

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

MCR 2.403(O)(1), (6) Rejecting party's liability for costs

Suggestion: consider motion for costs as another opportunity for settlement.

If a party has rejected the case evaluation and the action proceeds to verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the evaluation.

If both parties reject the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. MCR 2.403(O)(1).

1. Verdict

"Verdict" is—MCR 2.403(O)(2):

a) a jury verdict,

b) a judgment by the Court after a non-jury trial,

c) a judgment entered as a result of a ruling on a motion after rejection of the evaluation, *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 157 (1995),

d) a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the evaluation.

A verdict does not include a settlement by the parties. *Webb v Holzheuer,* 259 Mich App 389, 391-392 (2003).

2. Actual Costs

"Actual costs" are—MCR 2.403(O)(6):

a) those costs taxable in any civil action

and

b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for service necessitated by the rejection of the evaluation.

MCR 2.403(O)(1) requires the award of "actual costs," which are defined by MCR 2.403(O)(6) as "those costs taxable in any civil action" and "a reasonable attorney fee based on a reasonable hourly rate or daily rate as determined by the trial judge." The award of the sanctions is mandatory, not discretionary. However, the court has discretion in determining the amount. For a case addressing sanctions when there are multiple parties, see *Frank v Kibbe & Associates*, 208 Mich App 346 (1995).

*See Section 3.56 on costs.

The court may, in the interest of justice, refuse to award actual costs when the "verdict" is a result of a motion under MCR 2.403(O)(2)(c). MCR 2.403(O)(11).*

Costs are not awarded if the evaluation award was not unanimous. MCR 2.403(O)(7).

MCR 2.405(E) provides that cost may not be awarded under offer of judgment rule for post mediation offer unless the award was not unanimous.

Attorney fees and costs incurred prior to the deadline for accepting or rejecting the evaluation may not be recovered. *Taylor v Anesthesia Associates*, 179 Mich App 384, 386 (1989).

The court has authority to award costs and attorney fees for post-trial proceedings. *Troyanowski v Kent City*, 175 Mich App 217, 226-227 (1988).

The Supreme Court has granted leave in *Haliw v City of Sterling Heights,* 257 Mich App 689 (2003), which held that appellate attorney fees may be awarded as sanctions under MCR 2.403(O)(6)(b).

3. Costs Taxable in Any Civil Action—MCR 2.403(O)(6)

The rule refers to "costs taxable in any civil action." MCR 2.403(O)(6)(a). The courts have construed this to limit recovery to those authorized by statute. *Taylor, supra* at 387-388 (1989), and *C Reinhardt Co v Winiemko*, 196 Mich App 110, 117-118 (1992). For taxable costs, see MCL 600.2405, 600.2441 and 600.2455, along with MCR 2.625(A)(1) and (F).

MCR 2.625(B)(2), which addresses costs, provides that the party who prevails on the entire record is deemed the prevailing party. "The fact that [plaintiff] recovered less than the full amount of damages sought is not dispositive of whether it was the prevailing party. On the other hand, mere recovery of some damages is not enough; in order to be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation....We read MCR 2.625(B)(2) and MCR 2.403(O)(6) together to

conclude that the party entitled to actual costs under the case evaluation rule for a cause of action shall also be deemed the prevailing party under MCR 2.625(B)(2) on the entire record." *Forest City v Leemon Oil*, 228 Mich App 57, 81 (1998).

4. Reasonable Attorney Fee—MCR 2.403(O)(2)

The court has discretion to set attorney fees and its award will be upheld absent an abuse of discretion. *Cleary v The Turning Point*, 203 Mich App 208, 211 (1994). In determining a reasonable hourly or daily rate, the court should utilize empirical data and consider the criteria set forth in cases such as *Wood v DAIIE*, 413 Mich 573, 588 (1982). See also *Jernigan v Gen Motors Corp*, 180 Mich App 575, 587 (1989), and *Temple v Kelel Distributing*, 183 Mich App 326, 333 (1990).*

*See Section 3.57 on attorney fees.

The award should not be based on a contingent fee. *Id.* There is nothing in the plain language of the rule that requires a trial court to find that reasonable fees never amount to actual fees. *Troyanowski v Kent City*, 175 Mich App 217, 227 (1988). The court may award attorney fees based on an hourly rate that exceeded the actual hourly rate charged, *Cleary v The Turning Point*, 203 Mich App 208, 211-212 (1994), since nothing in the rule requires a trial court to find that reasonable attorney fees are equivalent to actual fees. The court can consider expenses incurred when determining a reasonable attorney fee. *MBPIA v Hackert Furniture*, 194 Mich App 230, 236-237 (1992).

Consideration of a mediation evaluation before entry of judgment is not permissible when considering whether to assess costs and award attorney fees and determining the amount to be awarded. MCR 2.403(O)(8). See also *O'Neill v Home IV Care, Inc*, 249 Mich App 606 (2002).

Where plaintiff obtained a smaller jury verdict on her Whistleblower Protection Act claim than the case evaluation she had rejected, the court improperly allowed plaintiff's potential liability for case evaluation sanctions to influence the amount of attorney fees awarded under the WPA. *Id.*

a) Attorney Representing Himself:

When an attorney is representing himself, he may not recover attorney's fees. *Watkins v Manchester*, 220 Mich App 337 (1996).

b) Paralegal Fees:

MCR 2.403(O)(6) and MCL 600.2405 allow the recovery of "attorney fees" which includes expenses incurred by the attorney, including paralegal fees. MCR 2.626(B).

5. Interest on Sanctions

There is presently a split of authority on whether interest may be recovered on the attorney fee award. Interest was denied in *Harvey v Gerber*, 153 Mich App

528, 530 (1986), but authorized in *Wayne-Oakland Bank v Brown Valley Farms, Inc*, 170 Mich App 16, 22-23 (1988). See *Gianneti Bros v City of Pontiac*, 175 Mich App 442, 447-448 (1989).

6. Double Award?

Once the prevailing party is awarded attorney fees as part of their claim, additional attorney fees under MCR 2.403(O) are not warranted. *Rafferty v Markovitz,* 461 Mich 265 (1999), overruling *McAuley v Gen Motors Corp*, 457 Mich 513, 522-523 (1998).

Plaintiffs' decision to accept a case evaluation award pursuant to MCR 2.403 constitutes a waiver of the right to collect fees under the Fees Act as recognized in *Venegas v Mitchell*, 495 US 82, 88 (1990). MCR 2.403(M)(1) provides that an accepted award disposes of all claims in the action and includes all fees, costs, and interest to the date it is entered. It is for the case evaluation panel to decide if costs, fees, or interest should be included in any evaluation under MCR 2.403. *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332 (1992). If the panel declines to award costs or fees, the mutual acceptance of the evaluation waives the subsequent raising of the issue of costs or fees in the trial court pursuant to the Civil Rights Attorney's Fees Act. *Mr X v Peterson*, 240 Mich App 287, 290 (2000).

I. Standard of Review

A trial court's decision whether to grant case evaluation sanctions is reviewed de novo. *Brown v Gainey Transportation Services, Inc,* 256 Mich App 380, 383 (2003).

3.34 Alternative Dispute Resolution

MCR 2.410 Alternative Dispute Resolution

MCR 2.411 Mediation

"All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule." MCR 2.410(A)(1). For purposes of the rule, "alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication," including settlement conferences under MCR 2.401, case evaluation under MCR 2.403, mediation under MCR 2.411 and any "other procedures provided by local court rule or ordered on stipulation of the parties." MCR 2.410(A)(2). Courts are authorized to develop ADR plans by local administrative order, which must meet the requirements of the court rule. MCR 2.410(B)(1).

"At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process." MCR 2.410(C)(1). The

order must provide for the selection and payment of the ADR provider and provide time limits for initiation and completion of the process. MCR 2.410(C)(2). The court rule provides an opportunity, within 14 days, to object to an order referring a case to an ADR process. MCR 2.410(E). Attorneys and parties can be required to attend the ADR proceedings. MCR 2.410(D).

MCR 2.411 governs mediation. Neither MCR 2.410 or MCR 2.411 permit a court to order a party to disclose information to a mediator that is not within the scope of discovery. *Wheeler v Baumgartener,* 468 Mich 947, 948 (2003).

3.35 Settlements

MCR 2.507(H) Agreements to be in writing

A. Must Be in Writing or on the Record

MCR 2.507(H) provides that an agreement by parties or their attorneys, subsequently denied, is not binding unless made in open court or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered, or by that party's attorney. This is essentially a statute of frauds governing legal proceedings. *Burnet v Decorative Engineering, Inc*, 215 Mich App 430, 435 (1996); *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571 (1994); *Rivkin v Rivkin,* 181 Mich App 718, 720 (1989); *Rossi v Transamerica Car Leasing*, 141 Mich App 403 (1985). In *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349 (1999), the court of appeals upheld the trial court's decision to enforce the settlement terms placed on the record where the parties could not later agree on the written language. However, "[a] settlement agreement will not be enforced even if it fulfills the requirements of contract principles where the agreement does not additionally satisfy the requirements of MCR 2.507(H)." *Columbia Associations v Dep't of Treasury,* 257 Mich App 656, 668-669 (2002).

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571 (1994).

A written agreement reached in a dispute resolution process under the Community Dispute Resolution Act is binding. *Plamandon v Plamandon*, 230 Mich App 54, 56 (1998).

An oral agreement under oath at a deposition hearing is not binding unless reduced to a signed writing or made in open court. *Burnet v Decorative Engineering Inc*, 215 Mich App 430, 436 (1996).

MCR 2.507(H) also applies to plea agreements in criminal cases. *People v Mooradian*, 221 Mich App 316, 318-319 (1997).

B. Attorney's Authority

An attorney is presumed to have authority to act on his client's behalf. *Jackson v Wayne Circuit Judge*, 341 Mich 55, 59 (1954). However, an attorney must have specific authority from the client to settle a case. *Henderson v Great Atlantic & Pacific Tea Co*, 374 Mich 142, 147 (1965); *Coates v Drake*, 131 Mich App 687, 696 (1984); *Nelson v Consumers Power Co*, 198 Mich App 82, 85 (1993).

An attorney cannot prevent his client from settling a case, but may have a lien for her services. *Simon v Ross*, 296 Mich 200, 203 (1941). See also *Miller v DAIIE,* 139 Mich App 565, 570-571 (1984); *Munro v Munro*, 168 Mich App 138, 141 (1988); *Doxtader v Siversen*, 183 Mich App 812, 815-816 (1990); and *George v Gelman,* 201 Mich App 474, 476-478 (1993).

C. Approval

Always have parties confirm settlement on the record.

Accept or approve settlement if placed on the record. Court approval is required for class actions, MCR 3.501(E), settlements for minors and incompetent persons, MCR 2.420(B), and may be requested for wrongful death settlements, MCL 600.2922(5).

Approve attorney fees and expenses if required.

Taxable costs are included in the settlement unless otherwise specified. MCR 2.625(H).

Settlement discussions are ordinarily not admissible. MRE 408 and 410.*

*See Section 2.18.

D. Wrongful Death Settlements

MCL 600.2922 governs wrongful death settlements. In wrongful death cases, it must be determined whether there was conscious pain and suffering, a claim which is an asset of the probate estate. MCL 600.2922(6)(d). The judge may wish to determine that there is no probate estate, and/or no creditors, before deciding there was no pain and suffering. MCR 8.121 addresses permissible attorney fees in wrongful death cases.*

*See Wrongful Death Settlement checklist in Appendix.

When reviewing the trial court's decision involving the distribution of wrongful death proceeds, findings of fact are reviewed for clear error and the court's distribution of the proceeds based on its findings for an abuse of discretion. *Hoogewerf v Kovach,* 185 Mich App 577, 579 (1990).

E. Settlements for Minors and Legally Incapacitated Individuals

MCR 2.420 governs settlements for minors and legally incapacitated individuals.* A hearing should be conducted. *Bowden v Hutzel Hosp*, 252 Mich App 566, 574 (2002). Note MCR 2.420(B)(2) addresses potential conflicts of interest. Make sure bond has been approved and filed with Probate Court if a conservator is appointed or required. MCR 2.420(B)(3).

*See Minor's Settlement checklist in Appendix.

F. Setting Aside Settlements

A settlement agreement is a contract and is governed by the legal principles applicable to the construction and interpretation of contracts. *Reagan v Ford Motor Co*, 207 Mich App 566, 571 (1994).*

*See Section 3.62 on release.

When the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete on its face. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502 (1998).

The validity of a contract of release turns on the intent of the parties. A release is invalid if (1) the releaser was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 618 (1994).

Settlement agreements are binding until rescinded for cause. Tender of consideration received is a condition precedent to the right to repudiate a contract of settlement. *Stefanac v Cranbrook Ed Comm*, 435 Mich 155, 163 (1990). In order to challenge a release, a plaintiff must actually tender the consideration he received for signing that release. *Id.* at 164.

For a tender to be effective, it must be without stipulation or condition. *Swain v Kayko*, 44 Mich App 496, 501 (1973).

The trial court's decision whether to permit a party to disavow a settlement is reviewed for an abuse of discretion. See *Groulx v Carlson,* 176 Mich App 484, 493 (1989).

The decision on a motion to set aside a consent judgment is reviewed for an abuse of discretion. *Trendell v Solomon,* 178 Mich App 365, 369-370 (1989).

Part V—Trial (MCR Subchapter 2.500)

3.36 Bench Trial

MCL 600.2101 Nonjury cases; admission of evidence; separate record

MCR 2.517 Findings by court

A. When Required

There is no right to a jury trial where the relief sought is solely equitable in nature. *Thomas v Steuernol,* 185 Mich App 148, 155-156 (1990); *Anzaldua v Band,* 216 Mich App 561, 573 (1996). However, MCR 2.509(D) permits equitable claims to be decided by a jury with the consent of the parties. *McPeak v McPeak,* 457 Mich 311 (1998).

B. Waiver of Jury

Where plaintiff demanded a jury trial and was awarded a default judgment, plaintiff's participation in bench trial proceedings on the issue of damages precludes him from challenging the damage award on appeal on the basis that a jury, not a judge, should have decided the issue. *Marshall Lasser, PC v George,* 252 Mich App 104, 108-109 (2002).

The waiver of a jury trial can be inferred from the conduct of the parties under a totality of the circumstances test. *Id*. It would be unfair to allow a party to demand a jury trial, participate in a bench trial without objection, and then attempt to overturn the result by claiming error based on the jury demand. *Id*.

C. Pretrial Motions

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions. *People v Shields*, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

D. Trial

Pursuant to MRE 614(b), a trial court may interrogate witnesses at trial. In a bench trial, the trial judge has more discretion to question witnesses than during a jury trial as long as the questioning is not intimidating, argumentative, prejudicial, unfair, or partial. *People v Wilder,* 383 Mich 122, 124-125 (1970). A showing of bias is required before reversing a verdict based upon a trial court's questioning of witnesses in a bench trial. *Id.* at 124; *People v Meatte,* 98 Mich App 74, 78 (1980).

Generally, during a bench trial the judge should only consider the same evidence and information that would be available to a jury. *People v Simon*, 189 Mich App 565, 567-578 (1991). It is also reversible error for the trial judge to view the premises without giving counsel and the parties an opportunity to be present. *Travis v Preston,* 247 Mich App 190, 201-202 (2001); *People v Eglar*, 19 Mich App 563, 565 (1969). The judge cannot use her specialized knowledge in deciding the case. *People v Simon*, 189 Mich App 565, 567-568 (1991).

E. Motion for Dismissal

At the close of plaintiff's evidence during a bench trial, the defendant may move for dismissal on the grounds that on the facts and the law plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff or may decline to render judgment until the close of all evidence. See *Begola Services, Inc v Wild Bros,* 210 Mich App 636, 639 (1995).

The standard on this motion is different than that for a directed verdict:

> "Unlike the motion for directed verdict, GCR 1963, 515.1 (now MCR 2.515), a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences. Plaintiff is not given the advantage of the most favorable interpretation of the evidence." *Marderosian v Stroh Brewery,* 123 Mich App 719, 724 (1983). (Citation omitted).

If the court grants the motion, it must make the findings under MCR 2.517(A)(1) so there can be a meaningful appellate review of the court's decision.

F. Decision

In a bench trial, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Articulation is designed to aid appellate review. *People v Johnson (On Rehearing),* 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith,* 211 Mich App 233, 235 (1995). There is a presumption that a trial judge in a bench trial knows the applicable law. *People v Sherman-Huffman,* 466 Mich 39, 43 (2002).

The trial court may not consider special knowledge from personal experience as a basis for fact-finding. *People v Simon,* 189 Mich App 565, 567-568

(1991). "A court must base its decision on testimony given in open court, not extrajudicial information." *Gubin v Lodisev,* 197 Mich App 84, 86 (1992), citing *McCamman v Davis,* 162 Mich 435 (1910).

*See Bench Trial Decision checklist in Appendix.

When rendering a decision after a bench trial, the author recommends that the judge cover the following:*

- Applicable statutes, if any;
- Applicable jury instructions;
- Burden of proof;
- Any presumptions which may apply;
- Findings of facts covering essential elements and issues with a level of specificity that will disclose to a reviewing court the controlling choices made between competing factual assertions. *Holbern v Holbern,* 91 Mich App 566, 569 (1979). A trial judge sitting as the trier of fact may not enter an inconsistent verdict. *People v Walker,* 461 Mich 908 (1999);
- Conclusions of law; and
- Direct entry of the appropriate judgment.

G. Standard of Review

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). Conclusions of law are reviewed de novo. See *Cardinal Mooney High Sch v Michigan High Sch Athletic Ass'n,* 437 Mich 75, 80 (1991).

3.37 Jury Trial

Const 1963, art 1, §§ 14, 20

MCR 2.508 Jury trial of right

MCR 2.509 Trial by jury or by court

*See Trial Outline—Civil Case in Appendix.

The right to a trial by jury shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. Const 1963, art 1, § 14. See also MCR 2.508.*

Parties to a civil proceeding have the right to a trial by jury unless: (1) the action is by its nature jury barred; (2) the claim is for equitable relief; (3) the legislature has not provided for the claim to be brought before a circuit court; or (4) the legislature denied the right to a jury. *Anzaldua v Band,* 457 Mich 530, 549 (1998).

There is no right to a jury trial where the relief sought is solely equitable in nature. *McDonald Ford Sales, Inc v Ford Motor Co,* 165 Mich App 321, 324 (1987). However, MCR 2.509(D) permits equitable claims to be decided by a jury with the consent of the parties. *McPeak v McPeak,* 457 Mich 311, 315-316 (1998).

In instances where a state actor is a defendant, the state cannot be tried by a jury unless the legislature specifies that type of claim as one that may be filed in the circuit court. MCL 600.6419; *Fox v Bd of Regents of the Univ of Michigan,* 375 Mich 238, 241 (1965).

There is no right to a jury trial for either informal or formal hearings regarding municipal and/or state civil infractions. MCL 600.8719, 600.8721, 600.8819, 600.8821.

3.38 Jury Selection

Const 1963, art 1, §§ 14, 20

MCL 600.1307a Jurors; qualifications; age exemption; service

MCR 2.511 Impaneling the jury

A. Composition of Jury Panel

The Sixth Amendment to the United States Constitution and Article I, Section 20 of the Michigan Constitution (1963) entitle a defendant to an impartial jury. The process whereby potential jurors are selected and brought to court is governed by MCL 600.1301 *et seq*. Generally, the process should be random and lead to potential juries that reflect a cross-section of the community.

Defendant is entitled to a jury which contains a representative cross-section of the community. *Taylor v Louisiana,* 419 US 522, 528 (1975). In order to establish a prima facie violation of the fair cross-section requirement, defendant must prove: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri,* 439 US 357, 364 (1979). *People v Guy*, 121 Mich App 592, 599-600 (1982). See also *Castaneda v Partida,* 430 US 482 (1977); *People v Smith,* 463 Mich 199 (2000); *People v Hubbard (After Remand),* 217 Mich App 459, 463-483 (1996); and *People v Williams,* 174 Mich App 132, 137 (1987).

The first prong requires a showing of the exclusion of a constitutionally cognizable group. *Hubbard, supra* at 473. The second prong requires a showing that the number of members of the cognizable group is not fair and reasonable in relation to the number of members of the relevant community. *Id.* at 473-474. The U.S. Supreme Court has not specified a preferred method of measuring under-representation. *Smith, supra* at 203. The lower federal courts have applied three different methods known as the absolute disparity test, the comparative disparity test and the standard deviation test. *Id.* The court in *Smith* indicated that all three approaches should be considered with no individual method used exclusive of the others. *Id.* at 204. The third prong requires a showing that the under-representation of the cognizable group is systematic, meaning resulting from some circumstances inherent in the particular selection process rather than a showing of one or two incidences of disproportionate panels. *Hubbard, supra* at 481.

B. Number

The number of jurors in a civil case is six. MCL 600.1352. The court may direct that seven or more jurors be empanelled to sit. MCR 2.511(B). By agreement, the court may retain more than six jurors. MCR 2.512(A)(3). The parties can also agree to a jury of less than six jurors. MCR 2.512(A)(1). Finally, the parties can agree on a stated majority for a verdict. MCR 2.512(A)(2).

C. Identity

The attorneys must be given a reasonable opportunity to examine the questionnaires before being called on to challenge for cause. MCR 2.510(C)(2). An "attorney's right to see the juror questionnaire ends when the trial ends." After the trial a court order following a motion is required. *Collier v Westland Arena,* 183 Mich App 251, 254 (1990).

The press has a qualified right of post-verdict access to juror names and addresses, subject to the court's discretion to consider jurors' concerns about safety and privacy. Access can be denied only if the court determines the jurors' safety concerns are legitimate and reasonable. *In re Jurors' Names,* 233 Mich App 604, 630 (1999).

D. Selection

A random selection process should be used. MCR 2.511(A); *People v Green (On Remand),* 241 Mich App 40 (2000).

E. Voir Dire

The court has broad discretion to limit or preclude voir dire* by the attorneys. MCR 6.412(C)(2). However, a court's discretion is not unlimited. See *People v Tyburski,* 196 Mich App 576, 581 (1992), and *People v Sawyer,* 215 Mich App 183, 186-192 (1996). There is no right to have the court ask questions submitted by counsel. *Id.* at 191.

*See Section 3.39, below, for further discussion of voir dire.

The court's voir dire procedure must include questioning a panel equal in size to the jury which will hear the case and an opportunity to examine replacement jurors before exercising further challenges. MCR 2.511(F); *People v Colon,* 233 Mich App 295, 303 (1999).

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *White v City of Vassar,* 157 Mich App 282, 289 (1987).

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn, and the juror is allowed to remain on the jury, the defendant is entitled to relief on appeal if it can be established either (1) that the juror's presence on the jury resulted in actual prejudice, (2) that the defendant could have successfully challenged the juror for cause, or (3) that the defendant would have "otherwise dismissed" the juror by exercising a peremptory challenge had the information been revealed before trial. *People v Daoust,* 228 Mich App 1, 7-8 (1998). See also *People v Manser,* 250 Mich App 21, 27 (2002).

F. Challenge for Cause

MCL 768.10; MCR 2.511(D).

Jurors are presumed to be qualified. The burden of proving the existence of a disqualification is on the party alleging it. *People v Collins,* 166 Mich 4, 9 (1911). Voir dire is the process by which litigants may question prospective jurors so that challenges to the prospective jurors can be intelligently exercised. *People v Harrell,* 398 Mich 384, 388 (1976). Prospective jurors are subject to challenge for cause under MCR 2.511(D). See *Bynum v The ESAB Group, Inc,* 467 Mich 280, 283 (2002).

Froede v Holland Ladder Co, 207 Mich App 127 (1994) holds that juror qualifications are a matter for the Legislature, and if there is a conflict between a statute and court rule dealing with juror qualifications, the statute prevails. The Court concluded the statute covering juror qualifications, MCL 600.1307a, was controlling where it provided for disqualification while under sentence for a felony as opposed to the court rule which provided for disqualification if a juror had been convicted of a felony, MCR 2.511(D)(2). At page 133, there is a helpful discussion covering when the grant of a challenge for cause is mandatory and when it is discretionary. Generally, a juror must be excused when challenged for cause on the ground enumerated in MCR 2.511(D)(4)-(13), while the Court has some discretion with (D)(1) or

(2) challenges. See *People v Walker,* 162 Mich App 60, 64 (1987). See also *People v Legrone,* 205 Mich App 77, 80-82 (1994).

Jurors are presumed to be competent and impartial and the burden of proving otherwise is on the party seeking disqualification. *Walker, supra* at 63. If a party shows that a prospective juror comes within one of the categories enumerated in MCR 2.511(D), then the trial court is without discretion to retain the juror, who must be excused for cause. *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 251-252 (1989); *Walker, supra* at 64. Otherwise, the decision to excuse for cause is within the discretion of the trial court. *Id*. In *Walker, supra,* the court concluded a police officer should have been excused for cause even though his status and acquaintanceship with the prosecuting attorney and several prosecution witnesses, alone, was not sufficient to warrant an inference of bias. See *People v Roupe,* 150 Mich App 469, 474 (1986), the court concluded a juror should have been excused for racial bias, and the court's failure to do so was an abuse of discretion. See also *People v Williams,* 241 Mich App 519, 521 (2000).

G. Peremptory Challenges

MCR 2.511(E)(2)

In a civil case each party has three peremptory challenges. There are exceptions if parties are considered a single party or there are multiple parties.

The attorneys do not have unrestricted discretion in exercising peremptories and they may not be utilized to exclude on the basis of race or sex. *Batson v Kentucky,* 476 US 79 (1986); *Powers v Ohio,* 499 US 400 (1991); *Edmonson v Leesville Concrete Co,* 500 US 614 (1991); *Georgia v McCollum,* 505 US 42 (1992); *JEB v Alabama,* 511 US 127 (1994).

Analysis of a Batson challenge uses a three step process. First, the party opposing the strike must make a prima facie case of racial discrimination based on more than the minority status of the juror. To establish a prima facie case of discrimination, the opponent of the challenge must (1) show that the members of a cognizable racial group are being peremptorily removed and (2) articulate facts to establish an inference that the peremptory challenge is being used to exclude potential jurors on the basis of race. Second, if a prima facie case of discrimination is made, the burden shifts to the striking party to provide a race-neutral reason for the strike. The reason does not have to be persuasive or even plausible. Unless discriminatory intent is evident in the explanation, it is deemed race-neutral. Third, if a race-neutral explanation is provided, the court must then decide whether the opponent of the strike has proved purposeful racial discrimination. At this stage, the persuasiveness of the explanation becomes relevant. A hearing is required and each step should be addressed in turn. *Purkett v Elem,* 514 US 765, 767 (1995); *Harville v State Plumbing and Heating,* 218 Mich App 302, 319-320 (1996); *Clarke v KMart Corp,* 220 Mich App 381 (1996). A *Batson* ruling is reviewed for an abuse of discretion. *People v Howard,* 226 Mich App 528, 534 (1997).

The trial judge may raise a Batson issue sua sponte. *People v Bell (On Reconsideration),* 259 Mich App 583, 587-589 (2003).

To preserve a challenge to the jury array, a party must raise the issue before the jury is empanelled and sworn. *People v McKinney,* 258 Mich App 157, 161 (2003).

There is no constitutional right to exercise peremptory challenges. A defendant is not denied an impartial jury simply because he cannot make the most effective use of his peremptory challenges. *People v Daoust,* 228 Mich App 1, 7 (1998). However, the court cannot preclude the exercise of a peremptory challenge against a juror already "passed" by the party. *People v Schmitz,* 231 Mich App 521, 528-530 (1998).

H. Removal of Juror During Trial

The court has the discretion to remove a juror during trial for possible bias. *People v Mason,* 96 Mich App 47, 49-50 (1980). The court also has the discretion to remove a juror who becomes ill, *People v Tate,* 244 Mich App 553, 562 (2001), or a juror who is missing, *People v Bell,* 74 Mich App 270, 274 (1977).

I. Substitution of Jurors

With defendant's consent a trial court may excuse a juror who developed a medical condition after deliberations have begun and replace that juror with a dismissed alternate juror who had not acquired any extraneous information about the case. The judge must instruct the reconstituted jury to begin deliberations anew. *People v Tate,* 244 Mich App 553, 566-567 (2001). See also MCR 2.511(B).

J. Alternate Jurors

The court may direct that additional jurors be impaneled to sit. After the instructions to the jury have been given and the action is ready to be submitted, unless the parties have stipulated that all the jurors may deliberate, the names of the jurors must be placed in a container and names drawn to reduce the number of jurors to the number required. MCR 2.511.

K. Sequestration of Jury

Whether to sequester a jury is discretionary, MCL 768.16, *People v Haggart,* 142 Mich App 330, 337 (1985), CJI2d 2.15, except in extreme cases, *Sheppard v Maxwell,* 384 US 333 (1966).

L. Anonymous Jury

In *People v Williams,* 241 Mich App 519, 523 (2000), the parties referred to the jurors by number rather than name throughout the selection process. Biographical information was not withheld from the parties and nothing in the record indicates that the use of numbers undermined the presumption of innocence. There was no indication that the jurors thought the use of numbers rather than names to be out of the ordinary. The court of appeals concluded that "under the facts of this case, defendant's due process rights were not violated by using juror numbers instead of names at trial. However, we caution the trial courts about the potential for prejudice arising from the use of anonymous juries. The procedure should be employed only when jurors' safety or freedom from undue harassment is, in fact, an issue, and, when used, appropriate safeguards should be carefully followed to assure a fair trial." *Id.* at 525.

M. Substitution of Judges

When judges are substituted after voir dire, a defendant must show actual prejudice to justify reversal. *Brown v Swartz Creek VFW,* 214 Mich App 15, 21 (1995). *People v McCline,* 197 Mich App 711 (1992), which appears to conclude otherwise, was vacated by the Michigan Supreme Court in *People v McCline,* 442 Mich 127 (1993).

N. Standard of Review

Alleged violations of the jury selection process are reviewed de novo. *People v Schmitz,* 231 Mich App 521, 528 (1998).

"Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court." *People v Hubbard (After Remand),* 217 Mich App 459, 472 (1996).

A trial court's ruling on a Batson challenge is reviewed for an abuse of discretion. *Harville v State Plumbing and Heating,* 218 Mich App 302, 320 (1996).

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *White v City of Vassar,* 157 Mich App 282, 289 (1987).

A judge's decision on whether to conduct a midtrial voir dire is reviewed for abuse of discretion. *People v Washington,* 251 Mich App 520, 529 (2002).

The abuse of discretion standard applies to review of the trial court's ruling on a challenge for cause. *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 236 (1989). However, "once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the

trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles,* 260 Mich App 379, 383 (2004).

The decision of a trial court to remove a juror will be reversed only upon a finding of a clear abuse of discretion. *People v Mason,* 96 Mich App 47, 49-59 (1980).

3.39 Voir Dire

MCR 2.511 Impaneling the jury

A. Generally

Jurors are presumed to be qualified. The burden of proving the existence of a disqualification is on the party alleging it. *Bynum v The ESAB Group, Inc,* 467 Mich 280, 283 (2002). Voir dire is the process by which litigants may question prospective jurors so that challenges to the prospective jurors can be intelligently exercised. *Id.* Prospective jurors are subject to challenge for cause under MCR 2.511(D). *Id.*

"The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski,* 445 Mich 606, 618 (1994). The court rules permit the court, the lawyers or both to do the voir dire. MCR 2.511(C). The scope is within the court's discretion. See MCR 6.412(C)(1). There are no "hard and fast rules" regarding what constitutes acceptable voir dire; rather, the trial court is granted wide discretion in the manner employed to achieve an impartial jury. *Tyburski, supra* at 623.

When the trial court, rather than the attorneys, conducts voir dire, the court is required "to conduct a thorough and conscientious voir dire designed to elicit enough information for the court to make its own assessment of bias." *Id.* "[T]he court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.* at 619. There is no right to have the court ask questions submitted by counsel. *People v Sawyer,* 215 Mich App 183, 191 (1996).

The court's voir dire procedure must include questioning a panel equal in size to the jury which will hear the case and an opportunity to examine replacement jurors before exercising further challenges. MCR 2.511(F); *People v Colon,* 233 Mich App 295, 303 (1999).

It is the duty of counsel to ferret out potential bases for excusing jurors. See *People v Scott,* 56 Mich 154 (1885).

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn, and the juror is allowed to remain on the jury, the defendant is entitled to relief on appeal if it can be established either (1) that the juror's presence on the jury resulted in actual prejudice, (2) that the defendant could have successfully challenged the juror for cause, or (3) that the defendant would have "otherwise dismissed" the juror by exercising a peremptory challenge had the information been revealed before trial. *People v Daoust,* 228 Mich App 1, 7-8 (1998). See also *People v Manser,* 250 Mich App 21, 27 (2002). A trial court's decision whether to conduct a midtrial voir dire is reviewed for abuse of discretion. *People v Washington,* 251 Mich App 520, 529 (2002).

B. Scope

The purpose of voir dire is the exploration of grounds for possible challenges for cause and peremptory challenges. See MCR 6.412(C)(1). Questions regarding religion are not permitted. See MCL 600.1436; *People v Bouchee,* 400 Mich 253, 264 (1977), and *People v Vasher,* 449 Mich 494, 500 (1995).

C. Timing

To properly preserve a challenge to the jury array, a party must raise the issue before the jury is empanelled and sworn. *People v McKinney,* 258 Mich App 157, 161 (2003).

D. Jury Nullification

Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence. *People v St Cyr,* 129 Mich App 471, 473-474 (1983). Jury nullification is a de facto power with regard to which the jury is not instructed, not a right. *People v Bailey,* 451 Mich 657, 671 n 10 (1996). In the absence of the Legislature's recognition of jury nullification as a defense, a defendant is not entitled to present a defense that does nothing more than present facts that are aimed solely at prompting jury nullification. *People v Demers,* 195 Mich App 205, 206-208 (1992).

E. Standard of Review

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *In re Spears,* 250 Mich App 349, 351-352 (2002).

A judge's decision on whether to conduct a midtrial voir dire is reviewed for abuse of discretion. *People v Washington,* 251 Mich App 520, 529 (2002).

3.40 Opening Statements and Closing Arguments

MCR 2.507(A) and (F) Opening statements; time allowed

MCR 2.507(E) and (F) Final arguments; time allowed

A. Opening Statements

1. Generally

Opening argument is the appropriate time to state the facts to be proven at trial. *People v Nard,* 78 Mich App 365, 374-375 (1977).

"The trial court is given very wide discretion in ruling upon the content and presentation of opening statements." *Haynes v Monroe Plumbing,* 48 Mich App 707, 712 (1973). Counsel for both sides should be encouraged to present their case in a way that will be most clearly understood by the jury. *Campbell v Menze Const Co,* 15 Mich App 407, 409 (1968).

"The extent to which visual aids can be used, when and whether they are to be marked for the record and the comment to be made by preliminary or final instructions that such drawings, charts, or calculations are not evidence rests within the sound discretion of the trial court." *Id*. The author believes that the trial court has the discretion to permit the use of proposed exhibits during opening statements.

2. Limitations

The court can place reasonable limits on opening statements and closing arguments. MCR 2.507(F); *Warden v Fenton Lanes, Inc,* 197 Mich App 618, 625 (1992).

"The trial court has discretion to determine what constitutes a fair and proper opening statement. Further, the court may limit the amount of time allotted to each party for its opening statement. MCR 2.507(F). . . . [T]he opening statement may be waived with the consent of the court and the opposing party." *People v Buck,* 197 Mich App 404, 413 (1992) (citations omitted). Where defense reserved opening statement and at the conclusion of plaintiff's proofs indicated he did not plan to call any witnesses or present any evidence, defense counsel was not entitled to present an opening statement. *Id*.

3. Motion on Opening Statement

A motion for directed verdict* may be based upon the opening statement using the standard of construing the evidence in the light most favorable to the party against whom the motion is directed. *Ballinger v Smith,* 328 Mich 23, 29 (1950). Summary judgment may be given based upon plaintiff's opening statement in a negligence action. *Hole v Erskin,* 3 Mich App 302, 304 (1966).

*See Section 3.46 for further discussion of motions for directed verdict.

B. Closing Arguments

1. Generally

Closing argument is meant to help jurors understand the evidence and the way in which each side sees the case. M Civ JI 2.02.

Counsel are permitted to state what inferences of fact they believe should be drawn from the proofs. *Lake Oakland Heights Park Assoc v Waterford Twp,* 6 Mich App 29, 34 (1967).

Counsel are entitled to some license in their final argument, and the testimony to them may bear quite different inferences and conclusions than might be deduced by a disinterested and unbiased judge. *Kujawski v Boyne Mountain Lodge, Inc,* 379 Mich 381, 385-386 (1967). "Defendant had the right to ask the jury to believe his case, however improbable it may have seemed." *Hunt v Freeman,* 217 Mich App 92, 99 (1996).

2. Limitations

The only facts which counsel are properly permitted to comment upon before a jury are those that have been elicited during the trial. *Carne v Litchfield,* 2 Mich 340, 343 (1852). Neither side may comment on evidence which has not been admitted. *Gonzales v Hoffman,* 9 Mich App 522, 526 (1968). In particular, deposition testimony which is not part of the record is not a proper subject of summation. *Grewette v Great Lake Transit,* 49 Mich App 235, 238-239 (1973).

It is reversible error for the defense to ask the jury to consider the effect which their judgment will have on them personally, however, an isolated invitation to the jury to put themselves in the defendant's shoes is harmless error. *Clark v Grand Trunk Western R Co,* 367 Mich 396, 400 (1962) and *Brummitt v Chaney,* 18 Mich App 59 (1969).

Personal attacks on the integrity of witnesses by defense counsel in argument or in examination are reversible error. *Godspeed v Hildebrand,* 131 Mich 375, 376-377 (1902). It is also error to call into question the honesty and integrity of opposing counsel. *Eley v Turner,* 155 Mich App 195, 202 (1986).

In a personal injury action it is not error to suggest a mathematical formula to aid the jury in determining damages for pain and suffering on a daily basis. *Yates v Wenk,* 363 Mich 311, 317-319 (1961). On the other hand, it is improper to argue that "[n]obody would go through this pain and suffering for any sum of money," *Stone v Sinclair Refining Co,* 235 Mich 53, 55 (1926), or to suggest how much it would cost to hire someone to suffer the same injuries, *Crenshaw v Goza,* 43 Mich App 437, 446 (1972).

C. Scope of Rebuttal

A rebuttal closing argument may not extend "beyond the issues raised in the preceding arguments." MCR 2.507(E). See also *Heintz v Akbar,* 161 Mich App 533, 537 (1987). The trial judge has broad power and discretion concerning the conduct of the arguments before the jury. *Id*. at 538; *Bugar v Staiger,* 66 Mich App 32, 36-37 (1975).

D. Standard of Review

The trial court's limitations on the time for argument is reviewed for abuse of discretion. *Warden v Fenton Lanes, Inc,* 197 Mich App 618, 625 (1992). A harmless error analysis may also be applied. *Id.*

3.41 Oaths or Affirmations

Const 1963, art 1, § 11

MCL 8.3k "Oath" and "sworn" defined

MCL 339.506(1) Interpreter's oath

MCL 600.1432 Mode of administering oaths

MCL 600.1440 Persons who may administer oaths

MCL 768.15 Affirmation in lieu of oath

MCR 2.511(G) Oath of jurors

MRE 603 Oath or affirmation

MRE 604 Interpreters

M Civ JI 1.04 Juror oath

M Civ JI 1.10 Juror oath

A. Juror Oath Before Voir Dire

"Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?" M Civ JI 1.04.

B. Juror Oath Following Selection

"Does each of you solemnly swear or affirm that, in this case now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God?" M Civ JI 1.10.

C. Oath for Bailiff Before Deliberation

"You do solemnly swear or affirm that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial from separating from each other; that you will not suffer any communication to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God." MCL 768.16.

D. Oath for Witness

MRE 603 states that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Traditionally, courts have used the following form:

> "Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?"

E. Oath for Interpreter

An interpreter must be administered an oath or affirmation "to make a true translation." MRE 604. MCL 393.506(1) requires an interpreter for a deaf person to make an oath or affirmation to make a true interpretation in an understandable manner in the English language to the best of the interpreter's ability. The following may be used for both foreign language and sign language interpreters:

> "Do you solemnly swear or affirm that you will make a true and understandable interpretation of the witness and that you will accurately interpret the statements made by the witness to the best of your ability?"

F. Child Witness

Former MCL 600.2163, which was repealed in 1998, provided that when a witness under 10 years of age was produced, the court was required to examine the child to determine his or her competency. If the court found that the child was competent to be a witness, he or she could give a promise to tell the truth instead of an oath or affirmation. See now MRE 601. Today, when a witness under ten years of age is produced, it is probably best to merely ask the child, "Do you promise to tell the truth?" Then address any competency issue if it is raised.

G. Caution to Witness

I instruct you not to discuss this case or your possible testimony with any other witness until you learn the case has been concluded.

Give this instruction when witnesses have been excluded under MRE 615.

3.42 Stipulations

MCR 2.507(H) Agreements to be in writing

A. On the Record or in Writing

Stipulations must be made in open court or must be in writing and signed by the parties or the parties' attorneys on their behalf. MCR 2.116(A) and MCR 2.507(H). The terms of a stipulation must be certain and definite. *Whiteley v Chrysler Corp*, 373 Mich 469, 474 (1964). Rules of contract construction apply to stipulated orders. *Phillips v Jordan,* 241 Mich App 17, 21 (2000).*

*See Section 3.62(B) on contract construction.

B. Stipulation of Law or Fact?

"While stipulations of law are not binding on courts, stipulations of fact are sacrosanct." *DeRush v DeRush*, 218 Mich App 638, 641 (1996) (citations omitted).

Stipulations of fact are permissive, not mandatory. Counsel can choose the form of evidence they prefer and should not be compelled to accept an offered stipulation of fact.

C. Enforcement

The courts should encourage and enforce stipulations unless there is a clear reason not to do so. *Conel Development, Inc v River Rouge Savings Bank*, 84 Mich App 415, 419 n 5 (1978). Once a stipulation is made, it is binding on the parties and may not be attacked on appeal. See *People v Kremko*, 52 Mich

App 565, 575 (1974). However, if there is evidence of mistake, fraud, or unconscionability, the court may grant relief from a stipulation. *Meyer v Rosenbaum*, 71 Mich App 388, 393-394 (1976).

D. Setting Aside

A trial court does have equitable power to relieve a party from a stipulation where there is evidence of mistake, fraud, or unconscionable advantage taken by one party over the other. *Valentino v Oakland Sheriff,* 134 Mich App 197, 206 (1984), rev'd on other grounds 424 Mich 310 (1986).

"A fraud is perpetrated on the court when some material fact is concealed from the court or some material misrepresentation is made to the court." *Id*. at 207.

"Where a party alleges that a fraud has been perpetrated on the court, the court must conduct an evidentiary hearing to determine whether such fraud exists." *Id*.

3.43 Subpoenas

MCL 600.1455(1) Courts of record; power to issue subpoena

MCR 2.506 Subpoena; order to attend

A. In General

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the testimony of witnesses, and MCR 2.506 regulates that process. There are a number of specialized statutes providing for subpoenas in particular situations. In addition to requiring the attendance of a party or witness, the court is authorized to subpoena a representative of an insurance carrier for a party, "with information and authority adequate for responsible and effective participation in settlement discussions," to be present or immediately available at trial. MCR 2.506(A)(2). Subpoenas may be signed by an attorney of record in the action or by the clerk of the court. MCR 2.506(B)(1). The court may enforce its subpoenas using its contempt power, MCR 2.506(E), and is provided other enforcement options by MCR 2.506(F).

B. Subpoena for Party

Absent a subpoena or court order to appear, a defendant in a civil case is not required to appear for trial. *Rocky Produce, Inc v Frontera,* 181 Mich App 516, 517 (1989).

C. Subpoena Duces Tecum

A party or witness may be required to bring specified notes, records, documents, photographs or other portable tangible things. MCR 2.506(A)(1).

Subpoenas issued pursuant to MCR 2.506(A)(1) "have no relation to subpoenas issued in conjunction with discovery proceedings. The end of the discovery period does not preclude the issuance of trial subpoenas, including subpoenas duces tecum, even if the records to be produced were not the subject of discovery." *Boccarossa v Dep't of Transportation,* 190 Mich App 313, 316 (1991).*

*See also MCR 2.314 and MCR 2.310, which provide for the discovery of records of a party or nonparty.

A subpoena for hospital medical records is controlled by MCR 2.506(I).

D. Post-Judgment Subpoena

A judge may issue a subpoena for discovery of a judgment-debtor or a person who has a judgment-debtor's money or property or who is indebted to a judgment-debtor. MCL 600.6110(1). An affidavit is required, and the subpoena should be signed by a judge because the statute requires that the affidavit satisfy the judge. A form for the affidavit is on the reverse side of the subpoena. SCAO Form MC 11.

E. Motion to Quash Subpoena

MCR 2.506(H) provides that person served with a subpoena may appear and challenge the subpoena.

3.44 Questions or Comments by Judge

MRE 614 Calling and interrogation of witnesses by court

M Civ JI 3.08

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette,* 214 Mich App 336, 340 (1995).

"When a case is tried before a jury, the judge must take care that his questions and comments do not indicate partiality. *People v Jackson,* 98 Mich App 735, 740 (1980). A new trial will be ordered where such comments quite possibly could have influenced the jury to the detriment of defendant's case. *People v Smith,* 64 Mich App 263, 267 (1975)." *People v Pointer,* 133 Mich App 313, 316-317 (1984). Judicial questioning which creates a suspicion as to the witness's credibility is discouraged. *People v Ross,* 181 Mich App 89, 91

(1989) [questioning of the defendant]; *People v Sterling,* 154 Mich App 223, 228 (1986) [questioning of a witness].

Examples of objectionable conduct by the trial court include: Volunteering information not in evidence, "campaigning from the bench," and interrupting and making derogatory remarks toward counsel. *People v Conyers,* 194 Mich App 395, 405-406 (1992).

3.45 View

MCR 2.513 View

A. Generally

The purpose of the jury view is not to furnish new evidence, but to enable the jurors to understand the evidence presented in the courtroom. *Valenti v Mayer,* 301 Mich 551, 558 (1942). The court has discretion whether to permit a jury view. In exercising its discretion, the court may consider whether there has been a change in the interim and exhibits already introduced showing the condition of the area. *West v Livingston Road Comm'n,* 131 Mich App 63, 67 (1983).

B. Process

MCR 2.513 governs a jury view in a civil case. It specifically provides that a view may be ordered on motion of either party or by the court on its own initiative. The court is authorized to order the party requesting a jury view to pay the expenses of the view. Also, the Court is authorized to conduct a view when it is the trier of fact. MCR 2.513 (B). However, the judge should not conduct a view without giving the parties notice and an opportunity to be present. *Travis v Preston (On Rehearing),* 249 Mich App 338, 349 (2002).

C. Standard of Review

The decision whether to permit a jury view is reviewed of an abuse of discretion. *West v Livingston Road Comm'n,* 131 Mich App 63, 67 (1983).

3.46 Directed Verdict

MCR 2.515 Motion for directed verdict

A. Rule

A party may move for a directed verdict at the close of the evidence offered by an opponent. Specific grounds must be stated. If the motion is denied, the moving party may offer evidence. MCR 2.515.

B. Standard

The Court must view the evidence presented at trial and all legitimate inferences that may be drawn from the evidence in a light most favorable to the opposing party and determine whether that party has established a prima facie case. *Berryman v KMart Corp*, 193 Mich App 88, 91 (1992); *May v Harper Hosp,* 185 Mich App 548, 552 (1990); *Feaheny v Caldwell*, 175 Mich App 291, 299-300 (1989). If reasonable minds (jurors) could honestly differ where the evidence presents material issues of fact, the motion should be denied. *May, supra* at 552 and *Feaheny, supra* at 300. If the evidence, viewed in this light, is insufficient to establish a prima facie case, then the motion should be granted. *May, supra* at 552 and *Feaheny, supra* at 300. A directed verdict technically orders the jury to find no cause of action. *Auto Club Ins Ass'n v Gen Motors Corp*, 217 Mich App 594, 601 (1996).

The Court should state its reasons or grounds for granting a motion for directed verdict. *Turner v Mutual Benefit Health & Accident Ass'n*, 316 Mich 6, 27 (1946).

The Court is not required to rule immediately on the motion and may take it under advisement. *Gutierrez v Michigan Consolidated Gas Co*, 332 Mich 537, 538 (1952).

If the motion raises deficiencies which could be cured, the Court should consider giving the opposing party the opportunity to make the necessary correction. Martin, et al., *Michigan Court Rules Practice*, Rule 2.515, n. 4 at 225-226 (3d ed 1986).

The same standard is applied to a motion for judgment notwithstanding the verdict. *Feaheny, supra* at 299-300.

C. Motion on Opening Statement

A motion for directed verdict may be based upon the pleadings and opening statement using the standard of construing the evidence in the light most favorable to the party against whom the motion is directed. *Ballinger v Smith*, 328 Mich 23, 29 (1950). However, "a directed verdict after an opening statement is a limited and disfavored action." *Young v Barker*, 158 Mich App 709, 720 (1987). A directed verdict is improper if the pleadings and the opening statement raise questions of fact that can be determined only by a trial on the merits. *Obremski v Dworzanin*, 313 Mich 495, 500-501 (1946).

In deciding a motion to dismiss, the court must consider both the plaintiff's opening statement and the pleadings. *Bell v Merritt*, 118 Mich App 414, 418 (1982). If the pleadings adequately establish the plaintiff's right to recover, granting a directed verdict for a lack of particularity in the opening statement is improper. *Visioneering Inc Profit Sharing Trust v Belle River Joint Venture*, 149 Mich App 327, 331-332 (1986).

Summary disposition may be given based upon plaintiff's opening statement and the pleadings in a negligence action. *Hole v Erskin*, 3 Mich App 302, 304 (1966).

D. Motion for Involuntary Dismissal

*See Section 3.36 on bench trials.

A motion for a "directed verdict" in a bench trial is treated as a motion for an involuntary dismissal pursuant to MCR 2.504(B)(2). *Begola Services, Inc v Wild Bros,* 210 Mich App 636, 639 (1995); *Stanton v Dachille,* 186 Mich App 247, 261 (1990). The standard on this motion is different than that for a directed verdict. "Plaintiff is not given the advantage of the most favorable interpretation of the evidence." *Marderosian v Stroh Brewery,* 123 Mich App 719, 724 (1983). "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.' MCR 2.504(B)(2)." *Begola Services, supra.* The court may determine the facts and render a judgment against the plaintiff or may decline to render judgment until the close of all evidence. If the court grants the motion, it must make findings under MCR 2.517. *

E. Standard of Review

The trial court's decision on a motion for directed verdict is reviewed de novo. The evidence and all legitimate inferences is reviewed in the light most favorable to the non-moving party. A motion for directed verdict should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Sniecinski v Blue Cross and Blue Shield of Michigan,* 469 Mich 124, 131 (2003).

3.47 Jury Instructions

MCR 2.516 Instructions to jury

A. General Requirements

The court should be careful to characterize the instructions given as the court's instructions rather than identify them as instructions requested by a party. *People v Hunter,* 370 Mich 262, 267 (1963).

B. Required Instructions

MCR 2.516(D)(2) provides:

> "Pertinent portions of the Model Civil Jury Instructions must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party."

Appellate review of assignments of error claiming a violation of MCR 2.516 will be tested according to the standard adopted in MCR 2.613. While the appellate court should not hesitate to reverse for a violation of Rule 2.516, it should not do so unless it concludes that noncompliance with the rule resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be "inconsistent with substantial justice." *Johnson v Corbet,* 423 Mich 304, 327 (1985).

At the request of a party or on its own, the court may provide the jury with a full set of written or electronically recorded instructions, or a partial set on agreement of the parties or in response to a jury request. MCR 2.516(B).

C. Additional Instructions

MCR 2.516(D)(4) provides:

> "This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative."*

*See Section 3.52(F) on special verdicts.

Accordingly, "[a] trial judge has discretion regarding whether or not to give specific additional instructions requested by a party." *Hawkeye Ins Co v Harnischfeger Corp,* 102 Mich App 190, 194 (1980).

Where the standard jury instructions recommend that no instruction be given, the court shall not give an instruction on the matter unless it specifically finds for reasons stated on the record that the instruction is necessary to accurately state the applicable law and is not covered by other model instructions. MCR 2.516(D)(3).

D. Jury Requests to Clarify Instructions

"Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria'." *People v Martin,* 392 Mich 553, 558 (1974), citing *Bollenbach v United States,* 326 US 607, 612 (1946), overruled in part on other grounds 416 Mich 581, 621 n 12 (1982). The decision to provide additional instructions at the request of the jury is within the discretion of the trial court. *Id.* If there is confusion about the verdict and the jury has not been discharged, the court has the authority to reinstruct the jury and have it clarify, after further deliberation, its intended verdict. See *People v Henry,* 248 Mich App 313, 320 n 20 (2001).

E. Standard of Review

Appellate review of assignments of error claiming a violation of MCR 2.516 will be tested according to the standard adopted in MCR 2.613. While the appellate court should not hesitate to reverse for a violation of Rule 2.516, it should not do so unless it concludes that noncompliance with the rule resulted in such unfair prejudice to the complaining party that the failure to vacated the jury verdict would be "inconsistent with substantial prejudice." *Johnson v Corbet,* 423 Mich 304, 327 (1985). See also *Cox v Flint Hosp Mgrs (On Remand),* 243 Mich App 72, 85-89 (2000).

MCR 2.516(C) requires an objection to assign as error the giving or failure to give an instruction. "Without an objection to the trial court's instructions, appellate review is foreclosed unless the complaining party has suffered manifest injustice." *Hickey v Zezulka,* 177 Mich App 606, 616 (1989). "Manifest injustice results where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case." *Mina v General Star,* 218 Mich App 678, 680-681 (1996).

Questions on the applicability of jury instructions are reviewed de novo. *People v Gonzalez,* 468 Mich 636, 641 (2003).

3.48 Jury Deliberation

MCR 2.516(B)(5) Instructing the jury

A. Materials in Jury Room

The court may permit the jury to take into the jury room any exhibits and writings admitted into evidence. See MCR 6.414(G). A trial court may not provide the jury with unadmitted evidence. *People v Davis,* 216 Mich App 47, 57 (1996). Although not authorized, the court may discover that jurors have used extraneous evidence such as dictionaries, maps or exhibits not

admitted into evidence. Prompt, appropriate action by the trial court may render the error harmless. For example, the extraneous evidence might be removed from the jury immediately upon its discovery and a cautionary instruction given. See *People v Messenger,* 221 Mich App 171, 175-178 (1997). See also *People v Gayton,* 81 Mich App 390, 396-398 (1978); *People v Jones,* 128 Mich App 335 (1983); *People v Clark,* 220 Mich App 240, 244-246 (1996) [where the discovery of two packets of cocaine in admitted exhibits was not harmless]. If the use of the extraneous evidence was not intrinsically offensive to the maintenance of the judicial system, a review under the standard set forth in *People v Budzyn,* 456 Mich 77, 88-89 (1997), is appropriate.

The court may provide the jury with a full or partial set of the instructions. MCR 2.516(B)(5). If the jury is provided with a copy of the jury instructions, they must be identified for the record. MCR 2.516(B)(5).

B. Conduct in Jury Room

A collective reenactment by the jury with a gun as to where the victim was likely sitting and where the gun should have fallen was found not to be the basis for a new trial in *People v Fletcher,* 260 Mich App 531, 541-544 (2004). The Court of Appeals distinguished this conduct from a reenactment or experiment outside of the jury room by a juror or group of jurors.

C. Juror Misconduct During Deliberations

The "near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v United States,* 483 US 107, 117 (1987). The only recognized exception to this common-law rule related to situations in which the jury verdict was affected by extraneous influences. *Id.* The Michigan Supreme Court in *People v Budzyn,* 456 Mich 77, 88-89 (1997), set forth a procedure to determine whether extrinsic or external influences affect a jury verdict. Juror affidavits "may only be received on extraneous or outside errors, such as undue influence by outside parties." *Id.* at 91. Any conduct, albeit misguided, that is inherent in the deliberative process is not subject to challenge or review. *People v Fletcher,* 260 Mich App 531, 540 (2004).

D. Standard of Review

A trial court's decision whether to grant a mistrial based on juror misconduct during deliberation is reviewed for an abuse of discretion. *People v Messenger,* 221 Mich App 171, 175 (1997).

3.49 Jury Questions

MCR 2.516(B) Instructing the jury

M Civ JI 2.11

A. Questions During Trial

"The questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he wishes, and it was error for a judge to rule that under no circumstances might a juror ask any questions." *People v Heard*, 388 Mich 182, 188 (1972). See M Civ JI 2.11.

B. Questions During Deliberation

Ordinarily communications with a jury should occur in open court and in the presence of, or after notice to, the parties or their attorneys. *Wilson v Hartley*, 365 Mich 188, 189 (1961).

The Michigan Supreme Court identifies three categories of communication with a deliberating jury. *People v France*, 436 Mich 138, 142-144 (1990). The three categories are:

1. Substantive

*See Section 3.47(D) on jury requests to clarify instructions.

"Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an absence of prejudice." *Id.* at 143.*

2. Administrative

"Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect." *Id.* at 143.

3. Housekeeping

"Housekeeping communications are those which occur between a jury and a court officer regarding meal order, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice." *Id.* at 144.

C. Requests to Rehear Testimony

With regard to a jury's request to rehear testimony, a trial court must use its discretion to assure fairness and refuse requests that are unreasonable, but the court may not refuse a request for fear of placing too much emphasis on a particular witness. *People v Howe*, 392 Mich 670, 676 (1974); *People v Crowell*, 186 Mich App 505, 508 (1990); *People v Davis*, 216 Mich App 47, 56 (1996).

It is not an abuse of discretion to refuse a jury's request to review transcripts when both attorneys agree to the denial. *People v Wytcherly (On Rehearing)*, 176 Mich App 714, 716 (1989); *People v Fetterley*, 229 Mich App 511, 520 (1998). Such an agreement may waive appellate review on the denial. See *People v Carter*, 462 Mich 206, 214 (2000).

A trial court may not provide the jury with unadmitted evidence. *People v Davis*, 216 Mich App 47, 57 (1996). Therefore, they should not be given a copy of a transcript of other proceedings that was not admitted. *Id*.

It is within the sound discretion of the trial court to determine whether testimony may be read to the jury, and the extent of that reading. The trial court may direct a jury to continue deliberating without rehearing testimony, as long as the possibility of rehearing the testimony later is not ruled out. *People v Johnson*, 128 Mich App 618, 622 (1983).

A trial court may ask a jury to try to narrow down a request for testimony. The trial court may explain that no printed copy of testimony is available and if possible offer the jury a choice between listening to audio tapes or having a court reporter read his or her notes. *People v Sullivan*, 167 Mich App 39, 48-49 (1988). See also *People v Dalessandro*, 165 Mich App 569, 583 (1988) and *People v White*, 144 Mich App 698, 703-704 (1985). These cases suggest a court has discretion to replay videotaped testimony for a jury, but that issue has apparently not been addressed by the appellate courts.

D. Standard of Review

Abuse of discretion has been the standard of review for responses to requests to rehear testimony. See above.

3.50 Hung Jury

MCR 2.512(C)(4) Discharge from action; new jury

M Civ JI 60.02

A. Instruction

If a jury appears to be deadlocked, first read M Civ JI 60.02 to see if that prompts a verdict. See *People v Sullivan*, 392 Mich 324, 329-331 (1974) and *People v Larry*, 162 Mich App 142, 148-151 (1987).

B. After Instruction

If it appears the jury is unable to reach a verdict after having been given M Civ JI 60.02, have the jury return and question the foreperson on the record to determine whether it is impossible to reach a verdict. Do not ask how their voting stands. *People v Hickey*, 103 Mich App 350, 353 (1981). Possible questions include:

- Is the jury deadlocked?
- How long have they been deadlocked?
- Has there been any change in the voting one way or the other?
- Do the jurors appear to have fundamental differences that cannot be resolved?
- Also, consider asking the lawyers if they wish to inquire of the foreperson.

"Trial judges are hereafter prohibited from asking any questions of jurors the answer to which might reasonably be expected to disclose the numerical division of the jury. Hence, it is strongly urged upon the trial bench that this be explained before any necessary and proper questioning regarding the state of the jury's deliberations begins." *People v Luther*, 53 Mich App 648, 650-651 (1974).

"Polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict. It should be reaffirmed that the principle that the double jeopardy guarantee does not bar retrial where the trial court declares a mistrial after it has reasonably concluded that the jury is unable to agree on a verdict." *People v Hickey*, 103 Mich App 350, 353 (1981).

"If a juror expresses disagreement with the verdict when the jury is polled, the jury must be sent out for further deliberations. The continuation of the polling and the subsequent questioning of the dissenting juror were improper because of their potentially coercive effect." *People v Echavarria*, 233 Mich App 356, 362 (1999).

C. Decision

If the court decides to declare a mistrial, mention that the declaration of a mistrial is discretionary with the court, and the court is exercising its discretion in light of the information received regarding the state of the jury deliberations.*

*See Section 4.52 for discussion of mistrial in criminal cases.

D. Standard of Review

A decision on a motion for a mistrial is within the trial court's discretion and will be reversed on appeal only for an abuse of discretion that resulted in a miscarriage of justice. *Schutte v Celotex Corp*, 196 Mich App 135, 142 (1992); *McCarthy v Belcher*, 128 Mich App 344, 347 (1983). The standard for granting a mistrial is whether the party has not had a fair and impartial trial. *Vaughan v Grand Trunk W R Co*, 153 Mich App 575, 579 (1986).

3.51 Mistrial

MCR 2.600 et seq. Judgments and orders; post-judgment proceedings

A. Generally

A mistrial is properly granted when prejudicial error has occurred and the error cannot be cured or rendered harmless by either a cautionary instruction to the jury or a continuance. *Willett v Ford Motor Co*, 400 Mich 65, 70-73 (1977).

B. Sanctions

Where plaintiff's counsel caused a mistrial by asking defendant-doctor if he had previously been sued for malpractice, the trial court properly ordered counsel to pay attorney fees resulting from the misconduct but erred by awarding a defense witness travel expenses and lost income. *Persichini v William Beaumont Hosp*, 238 Mich App 626 (1999).

Under the circumstances, the trial court did not abuse its discretion in concluding that a mistrial was required because a curative instruction would not have sufficed to cure the prejudice to defendants. *Id.*

Attorney fees generally are not recoverable from the losing party as costs; however, there is an exception to the general rule where the trial court awards costs to defendants as an exercise of its inherent power. *Id.*

C. Standard of Review

A decision on a motion for a mistrial is within the trial court's discretion and will be reversed on appeal only for an abuse of discretion that resulted in a miscarriage of justice. *Schutte v Celotex Corp*, 196 Mich App 135, 142 (1992); *McCarthy v Belcher*, 128 Mich App 344, 347 (1983). The standard for granting a mistrial is whether the party has not had a fair and impartial trial. *Vaughan v Grand Trunk W R Co*, 153 Mich App 575, 579 (1986).

3.52 Verdict

MCR 2.512 Rendering verdict

MCR 2.514 Special verdicts

A. Number

*See the verdict checklist in the Appendix.

Unless the parties agree otherwise, a verdict in a civil case will be that of five of the six jurors. MCR 2.512(A). The parties may stipulate to a jury of all jurors impaneled or less than six and a verdict by an agreed majority. MCR 2.512. The same number of jurors who agree on liability must also agree on damages. *Klanseck v Anderson Sales,* 136 Mich App 75, 84 (1984).*

B. Reaching a Verdict

See Section 3.50 on hung jury and Section 3.49 on jury questions.

C. Change in Verdict

A jury may change the form and substance of a verdict to coincide with its intention as long as the jury has not yet been discharged; the jury may be allowed to resume deliberations where, after the jury has announced its verdict, a poll of the jurors indicates that they might be confused and the jury has not been discharged (MCR 2.512 [B]). *Put v FKI Industries*, 222 Mich App 565 (1997).

The court rule does not state when the polling authorized by MCR 2.512(B)(2) is complete. However, the Court of Appeals has previously held that a jury can change the form and substance of a verdict to coincide with its intention as long as the jury has not yet been discharged. *People v McNary,* 43 Mich App 134, 143 (1972).

The purpose of the rule is furthered by allowing a jury to resume deliberations when the record indicates that the jury might be confused. *Put v FKI Industries*, 222 Mich App 565, 570 (1997).

Once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293 (1992). After a jury has been polled and discharged, testimony and affidavits by the jury members may only be used to challenge the verdict with regard to extraneous matters, like undue influence, or to correct clerical errors in the verdict in matters of form. Errors due to the jury's misunderstanding of the instructions, the verdict form, or faulty reasoning are inherent in the verdict and not susceptible to postdischarge challenge. *Id.* at 293-295.

D. Partial Verdict

Presumably, a jury can return a partial verdict in a civil case with multiple claims or parties. However, no case has been located on this issue.

E. Reconvening Jury

The jury cannot be reconvened after being discharged in a criminal case. See *People v Henry*, 248 Mich App 313, 320 (2001); *People v McGee*, 247 Mich App 325, 340-341 (2001). Presumably, this is also true of a civil jury. See MCR 2.512(B)(3).

F. Special Verdict

"The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." MCR 2.514(A). The form of special verdict shall be settled before closing argument. MCR 2.514(A). Whether a special verdict form should be submitted to the jury is within the trial judge's discretion. *Ketola v Frost,* 375 Mich 266, 274 n 4 (1965). The court shall enter judgment in accordance with the special verdict. MCR 2.514(B).

If a special verdict form is used, it is possible the jury will return inconsistent verdicts. "Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside . . . ." *Granger v Fruehauf Corp,* 429 Mich 1, 9 (1987). "The proper remedy to correct a defective verdict is to either re-instruct the jury or order a new trial." *Beasley v Washington,* 169 Mich App 650, 658 (1988). See also *Farm Bureau Ins v Sears, Roebuck & Co,* 99 Mich App 763, 766 (1980).

G. Inconsistent Verdicts

The general rule is that where a verdict in a civil case is inconsistent and contradictory, it will be set aside and a new trial will be granted. Ordinarily, a verdict may and should be set aside and a new trial should be granted where the verdict is self-contradictory, inconsistent, or incongruous, and such relief should, as a rule, be granted where more than one verdict is returned in the

same action and they are inconsistent and irreconcilable. However, every attempt must be made to harmonize a jury's verdicts; the verdicts should be disturbed only where they are "so logically and legally inconsistent that they cannot be reconciled." If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent. *Lagalo v Allied Corp*, 218 Mich App 490, 492-493 (1996). The rule remains valid although the Supreme Court overruled this case on the merits, 457 Mich 278 (1998).

H. Entry of Judgment

MCR 2.602 addresses the entry and settlement of judgments.

3.53 Findings of Fact and Conclusions of Law

A. When Required

Bench Trial. MCR 2.517(A)(1).

Involuntary Dismissal. MCR 2.504(B)(2).

Non-Standard Jury Instruction. MCR 2.516(D)(3).

Motion for New Trial or to Amend Judgment. MCR 2.611(F).

B. When Not Required

Any motion where not required. MCR 2.517(A)(4).

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions. *People v Shields*, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

C. Standard of Review

A court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *Whalen v Doyle,* 200 Mich App 41, 42-43 (1993).

A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46 (1976).

The standard of review is de novo on conclusions of law. See *Cardinal Mooney High Sch v Michigan High Sch Athletic Ass'n,* 437 Mich 75, 80 (1991).

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.54 Judgment Notwithstanding the Verdict and New Trial

MCR 2.610 Motion for judgment notwithstanding the verdict

MCR 2.611 New trials; amendment of judgments

A. In General

After a verdict in a civil case, a party may move for judgment notwithstanding the verdict under MCR 2.610 or request a new trial under MCR 2.611 or request relief under both court rules. Such motions may be an opportunity to clarify issues for possible appeal.

Timing. A motion under either court rule must be filed within 21 days after the entry of judgment. MCR 2.610(A)(1); MCR 2.611(B).

Decision. Must be in writing or on the record. Under either court rule, "the court must give a concise statement of the reasons for the ruling either in a signed order or opinion filed in the action or on the record." MCR 2.610(B)(3); MCR 2.611(F).

B. Motion for JNOV Standard — MCR 2.610:

Within 21 days after entry of judgment, a party may move to have the verdict and judgment set aside and to have judgment entered in the moving party's favor. The motion may be joined with a motion for a new trial, or a new trial may be requested in the alternative. MCR 2.610(A).

When examining a party 's motion for a judgment notwithstanding the verdict, like a directed verdict, the court must examine the testimony and all legitimate inferences that may be drawn in a light most favorable to the non-moving party. *Reisman v Wayne State Regents*, 188 Mich App 526, 538 (1991), citing *Matras v Amoco Oil Co*, 424 Mich 675, 681-682 (1986); *Lester N Turner PC v Eyde*, 182 Mich App 396, 398 (1990). If the evidence is such that reasonable jurors could honestly have reached different conclusions, neither the trial court nor the appellate court may substitute its judgment for that of the jury. If, on the other hand, the evidence is insufficient to establish a prima facie case, then the motion should be granted, since reasonable persons would agree

that there is an essential failure of proof. *Reisman, supra* at 538, citing *Feaheny v Caldwell*, 175 Mich App 291, 299-301 (1989). See also *Matras, supra* at 681-682 (1986); *Caldwell v Fox*, 394 Mich 401, 407 (1975); and *Sparks v Luplow*, 372 Mich 198, 202 (1963).

C. Failure to Timely Raise Issue

A general rule of trial practice is that failure to raise an issue waives review of that issue on appeal. *Napier v Jacobs*, 429 Mich 222, 227 (1987), citing *Spencer v Black*, 232 Mich 675, 676 (1925) (issue raised for the first time on appeal not properly before the Court); and *Molitor v Burns*, 318 Mich 261, 263-265 (1947) (failure to renew motion for directed verdict at close of defendant's case waived any error). In other words, a party waives his/her right to challenge the sufficiency of the evidence if not raised by motion for directed verdict or judgment notwithstanding the verdict.

In *Napier, supra* the sufficiency of the evidence was not challenged either in a motion for directed verdict or in post-verdict motions before the trial court. Any right to a judgment notwithstanding the verdict on the basis of insufficiency of the evidence was waived with defendant's failure to request a directed verdict on the basis of the insufficiency of the evidence. It is improper procedure for the defendant to allow a civil trial to go full-term, with a jury verdict rendered in plaintiff's favor and judgment entered pursuant to that verdict, with no objection raised during trial to the sufficiency of the evidence, and then to raise a challenge to the sufficiency of the evidence for the first time on appeal and receive judgment in its favor notwithstanding the jury verdict. *Id.* at 230.

D. Motion for New Trial Standard — MCR 2.611

MCR 2.611(A) sets forth eight (8) grounds upon which a motion for new trial may be granted. These grounds include:

a) irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial;

b) misconduct of the jury or of the prevailing party;

c) excessive or inadequate damages appearing to have been influenced by passion or prejudice;

d) a verdict clearly or grossly inadequate or excessive;

e) a verdict or decision against the great weight of the evidence or contrary to law;

f) material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial;

g) error of law occurring in the proceedings, or mistake of fact by the court;

h) a ground listed in MCR 2.612 warranting a new trial.

The court has discretion whether to grant or deny a motion for new trial under MCR 2.611. *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 761 (2004); *Kelly v Builders Square, Inc,* 465 Mich 29, 34 (2001). However, any questions of law that arise are reviewed de novo. *Kelly, supra* at 34. Otherwise, there is no one standard to be applied in reviewing a motion for new trial. Each ground asserted under MCR 2.611(A) should be analyzed separately.

In *Constantineau v DCI Food, Inc*, 195 Mich App 511, 514 (1992), the Court of Appeals similarly stated:

> "A new trial may be granted if a verdict is against the great weight of the evidence or contrary to law, or if an error of law has occurred in the proceedings. MCR 2.611(A)(l)(e) and (g). The decision whether to grant a new trial is one addressed to the trial court's discretion, and the trial court's decision will not be reversed absent an abuse of that discretion." *Beasley v Washington*, 169 Mich App 650, 655 (1988). (Emphasis added.)

E. Standard of Review

MCR 2.610:

> "In reviewing a trial court's denial of judgment notwithstanding the verdict, this Court should inquire whether the jury's verdict was against the great weight of the evidence. Furthermore, the decision of the trial court is afforded great deference because the trial judge, having heard the witnesses, is uniquely qualified to judge the jury's assessment of the witnesses' credibility. If reasonable minds could differ as to whether plaintiff satisfied her burden of proof, judgment notwithstanding the verdict would have been improper."*Stallworth v Hazel*, 167 Mich App 345, 350 (1988) (citations omitted).

MCR 2.611:

> "The grant or denial of a motion for new trial is reviewed for an abuse of discretion." *Bynum v The ESAB Group, Inc*, 467 Mich 280, 283 (2002).

3.55 Remittitur and Additur

MCR 2.611(E) Remittitur and additur

A. Definition

Remittitur is the procedural process by which an excessive verdict of the jury is reduced. *Pipen v Denision,* 66 Mich App 664, 674 (1976). If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order the plaintiff to remit a portion of the award. MCR 2.611(E)(1). In the alternative, the court may order a complete new trial or a trial limited to the issue of damages. MCR 2.611(A)(1). The court may also condition a denial of a motion for new trial upon the filing by the plaintiff of a remittitur in a stated amount. MCR 2.611(E)(1).

A trial court's order of remittitur is governed by MCR 2.611(E)(1):

> "If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support."

Palenkas v Beaumont Hosp, 432 Mich 527, 531-532 (1989) provides "remittitur is justified if the jury verdict is 'excessive,' i.e., if the amount awarded is greater than 'the highest amount the evidence will support.' . . . [T]rial courts, in addition to evaluating whether a jury award is supported by the proofs, have conducted a myriad of other inquiries in determining whether remittitur would be proper in a particular case: 1) whether the verdict 'shocks the judicial conscience'; 2) whether the verdict was the result of improper methods, prejudice passion, partiality, sympathy, corruption, or mistake of law or fact; 3) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; 4) whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions."

These same factors are used to analyze a request for additur. *Miller v Ochampaugh,* 191 Mich App 48, 62 (1991).

See *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 763-64 (2004), for an analysis of an excessive verdict permitting relief under MCR 2.611(A)(1)(c).

B. Standard of Review

A ruling on a motion for remittitur or new trial premised on a claim that the damage award was excessive is reviewed for an abuse of discretion. *Palenkas*

v Beaumont Hosp, 432 Mich 527, 531 (1989). The trial court's decision on a request for additur is also reviewed for an abuse of discretion. *Miller v Ochampaugh,* 191 Mich App 48, 62 (1991).

3.56 Costs

MCL 600.2401 et seq. Costs

MCR 2.625 Taxation of costs

A. Authority

"The power to tax costs is wholly statutory; costs are not recoverable where there is no statutory authority for awarding them." *Herrera v Levine*, 176 Mich App 350, 357 (1989). See also *People v Jones*, 182 Mich App 125, 126 (1989).

"Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). The party needs to prevail on only one theory when alternative theories are pled. *Tucker v Allied Chucker Co*, 234 Mich App 550, 560-561 (1999).

B. Procedure

"Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk. . . ." MCR 2.625(F)(1). When costs are to be taxed by the clerk, the bill of costs must be presented to the clerk within 28 days after the judgment is signed (or within 28 days of the order denying post-judgment relief). MCR 2.625(F)(2). A copy must be served on the other party. MCR 2.625(F)(2). The clerk is required to review the bill of costs and to be satisfied "that the items charged in such bill are correct and legal; and shall strike out all charges for services, which, in his judgment, were not necessary to be performed." MCL 600.2461. The clerk's action on the bill of costs is reviewable by the trial court on the motion of an affected party. MCR 2.625(F)(4). The requirements for the bill of costs are governed by MCR 2.625(G).

If the parties have created a sufficient record to review the issue, an evidentiary hearing is not required. But generally a trial court should hold an evidentiary hearing when there is a challenge to the costs requested. *Kernen v Homestead Development Co,* 252 Mich App 689, 691 (2002).

C. Attorney Fees and Costs

Some of the allowable costs are defined by statute. MCL 600.2441. Other statutes and court rules have special provisions for other or actual attorney fees. See, for example, MCL 600.2591, MCR 2.114(E) and (F).

D. Fees and Expenses as Costs

See MCL 600.2405 and 600.2421b. Taxation of costs for deposition transcript fees and certified copies of records is allowed when the documents are read into evidence at trial or necessarily used. *Herrera v Levine*, 176 Mich App 350, 358 (1989); *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 622 (1996); MCL 600.2549. The "necessarily used" facet of the statutory provision allows the taxation of costs for deposition transcripts submitted in support of a successful motion for summary disposition. *Portelli v IR Const*, 218 Mich App 591, 606 (1996).

E. Standard of Review

A lower court's determination to tax costs is reviewed for an abuse of discretion. *Portelli v IR Construction*, 218 Mich App 591, 604 (1996); *Beach v State Farm*, 216 Mich App 612, 621 (1996).

3.57 Attorney Fees

MCR 2.626 Attorney fees

MRPC 1.5

A. "Reasonable" or Actual Fees

When there is a dispute about the amount of attorney fees, the Michigan Court of Appeals in *Crawley v Schick*, 48 Mich App 728, 737 (1973), noted that each case must be evaluated based on its own facts, stating:

> "There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client."

"While a trial court should consider the guidelines of Crawley, it is not limited to those factors in making its determination. Further, the trial court need not detail its findings as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion." *Wood v DAIIE*, 413 Mich 573, 588 (1982).

Trial courts may also consider the eight factors in the Michigan Rules of Professional Conduct in determining the reasonableness of an attorney fee. MRPC 1.5(a). *RCO Engineering, Inc v ACR Industries, Inc,* 235 Mich App 48, 67 n 15 (1999), vacated in part on other grounds 463 Mich 979 (2001).

The factors are not exclusive. *Howard v Canteen Corp,* 192 Mich App 427, 437 (1991). Another factor that may be considered is a contingent fee agreement. *Phinney v Perlmutter,* 222 Mich App 513, 561 (1997).

B. Evidentiary Hearing

When an attorney fee is requested and a party challenges the reasonableness of that fee, an evidentiary hearing is required, and the court must make findings of fact on the issue. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480 (1996). Those findings may include the attorney's hourly rate and time spent on the case.

Expert testimony is not required. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 198 (1996).

An attorney may not be able to recover attorney fees when representing themselves. See *Watkins v Manchester*, 220 Mich App 337, 342-345 (1996); *FMB-First Michigan Bank v Bailey,* 232 Mich App 711, 719 (1998).

C. Contract Provides for Attorney Fee

"In *United Growth Corp v Kelly Mortgage & Investment Co*, 86 Mich App 82, 89-90 (1978), this Court held that, in the case of a contractual stipulation between the parties for reasonable attorney fees, such fees may be allowed but must be measured by the fair value of the services rendered." *Michigan National Leasing v Cardillo*, 103 Mich App 427, 436 (1981).

D. Statute Provides for Attorney Fee

Particular statutes authorize the recovery of attorney fees. For example, see *Cady v Dick Loehr's, Inc*, 100 Mich App 543, 547-549 (1980), and *Yuhase v Macomb County*, 176 Mich App 9, 12-15 (1989).

E. Contingent Fee

"Where an attorney's employment is prematurely terminated before completing services contracted for under a contingency fee agreement, the attorney is entitled to compensation for the reasonable value of his services on the basis of quantum meruit, and not on the basis of the contract, provided that his discharge was wrongful or his withdrawal was for good cause." *Plunkett & Cooney v Capitol Bancorp*, 212 Mich App 325, 329-330 (1995).

F. Attorney's Lien

An attorney may have a lien for his or her services. *Simon v Ross*, 296 Mich 200, 203 (1941); *Miller v DAIIE*, 139 Mich App 565, 570-571 (1984); *Munro v Munro*, 168 Mich App 138, 141 (1988); *Doxtader v Siversen*, 183 Mich App 812, 815-816 (1990); *George v Gelman*, 201 Mich App 474, 476-478 (1993).

G. Standard of Review

An award of attorney fees will be upheld absent an abuse of the trial court's discretion. *Petterman v Haverhill Farms*, 125 Mich App 30, 32 (1983).

3.58 Sanctions

There are a variety of situations in which the court may or must impose sanctions ranging from security for costs to payment of actual attorney fees to dismissal.

The trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney. In addition, the Supreme Court has "recognized the inherent power of a court to control the movement of cases on its docket by a variety of sanctions." Furthermore, MCL 600.611 provides, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639-640 (1999).

A. Security for Costs

*See Section 3.17 on security for costs.

MCR 2.109(A) provides that on motion of a party, the court may order security for costs. Exceptions are found in MCR 2.109(C). The court on its own may also require security. *Zapalski v Benton*, 178 Mich App 398, 404 (1989). Whether to require security is discretionary and requires a substantial reason. *Wells v Fruehauf Corp*, 170 Mich App 326, 335 (1988); *Attorney General v Oakland Disposal, Inc*, 226 Mich App 321, 331-333 (1997). A substantial reason exists when there is a tenuous legal theory of liability or where there is a good reason to believe a party's allegations are groundless and unwarranted. *Id.* at 331-332.*

B. Attorney Fees and Costs

*See Section 3.33.

1. Case Evaluation Sanctions. MCR 2.403(O).*

*See Section 3.32 on offer of judgment.

2. Offer of Judgment Sanctions. MCR 2.405(D) and (E).*

3. Frivolous Claims and Defenses. See Section 3.58(D), below.

4. Mistrial. The court may have the inherent power to sanction an attorney who causes a mistrial by his or her misconduct by ordering them to pay attorney fees resulting from the misconduct. *Persichini v William Beaumont Hosp*, 238 Mich App 626 (1999).

5. Statute. Several statutes require an award of attorney fees. The No Fault Act, MCL 500.3148, is an example. The Sales Representatives Act is another example. MCL 600.2961(6) requires the court to award attorney fees and costs to the prevailing party, a party who wins on all the allegations of the complaint or on all of the responses to a complaint. MCL 600.2961(1)(c). Plaintiff is entitled to plead alternative claims pursuant to MCR 2.111(A)(2). It is only necessary to prevail on one theory to be considered a prevailing party. *Tucker v Allied Chucker Co*, 234 Mich App 550, 560-561 (1999).

C. Dismissal

The court has discretion to dismiss a case* to sanction parties or their attorneys, but this is a drastic remedy, so all available options must be explored first. MCR 2.504(B), *North v Dep't of Mental Health*, 427 Mich 659, 662 (1986), *Hanks v SLB Management, Inc*, 188 Mich App 656, 658 (1991), and *Vicencio v Ramirez*, 211 Mich App 501, 506-507 (1995). Dismissal may occur for:

*See also Section 3.22 on dismissal.

1. Failure to Pay Previously Assessed Fees, Including Attorney Fees. *Sirrey v Danou*, 212 Mich App 159 (1995).

2. Failure to Permit Discovery. MCR 2.313 provides a range of sanctions for failure to permit discovery. The options include dismissal. MCR 2.313(B)(2)(c).

3. Lack of Progress. A case may be dismissed for failure to pursue it. MCR 2.502.

4. Failure to Appear. A case may be dismissed if the party fails to appear at trial, MCR 2.504(B)(1), or at a pre-trial conference, MCR 2.401(G). A moving party on a motion can be sanctioned for failure to appear for the hearing unless excused by the court. MCR 2.119(E)(4)(b) and (c).

"[A]ppellate courts have often warned 'that dismissal with prejudice is . . . to be applied only in extreme situations.' . . . [T]he trial court should evaluate the length, circumstances and reason for the delay in light of the need for administrative efficiency and the policy favoring the decision of cases on their merits, considering among other factors: 1) the degree of the plaintiff's personal responsibility for the delay, 2) the amount of prejudice to the defendant caused by the delay, 3) whether there exists a lengthy history of deliberate delay, and 4) whether the imposition of lesser sanctions would not better serve the interests of justice." *North v Dep't of Mental Health*, 427 Mich 659, 662 (1986) (citations omitted).

A trial court's decision to dismiss an action is reviewed for an abuse of discretion. Where the court fails to evaluate other available options on the record, it is an abuse of discretion to dismiss the case. *Vicencio v Ramirez*, 211 Mich App 501, 506-507 (1995). Some of the factors to be considered can be found in *Dean v Tucker*, 182 Mich App 27, 32-33 (1990). *Nippa v Botsford General Hosp*, 251 Mich App 664, 667 (2002).

D. Frivilous Claim or Defense

The court shall award reasonable costs and attorney fees against any attorney or party, or both, if it determines the claim was frivolous. MCR 2.114(E), (F); MCL 600.2591 and MCL 600.2421c. See also *Kitchen v Kitchen*, 465 Mich 654, 661-662 (2002). The attorney's law firm can also be sanctioned. *In re Attorney Fees and Costs*, 233 Mich App 694, 706-707 (1999). Sanctions are mandatory if the court finds a violation of MCR 2.114 occurred. *In re Goehring*, 184 Mich App 360, 367 (1990).

To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made. The factual determinations by the trial court depends on the particular facts and circumstances of the claim involved. *Powell Production, Inc v Jackhill Oil Co*, 250 Mich App 89, 94-95 (2002).

"The plain language of the statute states that costs and fees can be awarded if a court finds that a civil action or defense" is frivolous, and the court rule uses similar language. The state and court rule do not use the phrase "the" to modify the word "defense." *Id.* at 102.

Pro Se Litigants. Pro se parties are not eligible for attorney fee sanctions under MCR 2.114. The language of MCR 2.114(E) affords the court sufficient discretion to design an appropriate sanction. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 719 (1998).

Timeliness. The trial court has the discretion to decide if a motion for sanctions was timely if it has found that a party violated MCL 600.2591 (frivolous claims or defenses). The standard is whether the motion was filed within a reasonable time after the prevailing party was determined. *In re Attorney Fees and Costs*, 233 Mich App 694, 699 (1999).

A court will not disturb a trial court's finding that a defense was frivolous unless the finding was clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436 (1997). A decision is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made. *Id.*

The court will not disturb a trial court's finding that a claim was frivolous unless the finding is clearly erroneous. *In re Attorney Fees and Costs, supra* at 701.

E. Standard of Review

Some sanctions are mandatory while others are discretionary. The applicable statute, court rule or case law should be consulted.

A dismissal without prejudice will be upheld on appeal if the record made below indicates that the trial court has not abused its discretion. *North v Dep't of Mental Health*, 427 Mich 659, 661 (1986).

The court reviews the amount of sanctions awarded for an abuse of discretion. *Powell Production, Inc, v Jackhill Oil Company*, 250 Mich App 89, 104 (2002).

3.59 Enforcement of Judgments

MCL 600.6001 et seq. Enforcement of judgments

MCL 600.6101 et seq. Proceedings supplementary to judgment

MCR 1.110 Collection of fines and costs

MCR 2.601 et seq. Judgments and orders; postjudgment proceedings

MCR 3.101 et seq. Debtor-creditor

The statutes and court rules provide a variety of methods to collect a judgment, including garnishment, execution and judgment debtor discovery proceedings. The court is also authorized to permit the judgment debtor to pay a judgment in installments, precluding execution or garnishment. MCL 600.6107 and MCL 600.6201 et seq. MCR 3.104.

Enforcement proceedings involving hearings include:

- proceedings on judgment debtor discovery subpoenas, MCL 600.6110; MCR 2.621;*
- requests for installment payments, MCL 600.6201 et seq. (see also MCL 600.6107); and
- challenges to garnishments, MCR 3.101(K).

*See Section 3.43(D) on judgment debtor discovery subpoenas.

Judgments must be renewed after 10 years. MCL 600.5809(3). The renewal can occur by ex parte motion. *Van Renken v Darden,* 259 Mich App 454 (2003).

MCR 2.620 governs the methods to show satisfaction of judgment.

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

MCL 600.5001 et seq. Arbitration

MCR 3.602 Arbitration

A. Introduction

Under Michigan law, there are two types of arbitration, statutory arbitration and common law arbitration. *FJ Siller & Co v Hart,* 400 Mich 578, 581 (1977); *Hetrick v Friedman,* 237 Mich App 264, 268 (1999).

For arbitration to qualify as statutory, the following requirements must be met: (1) a written contract to settle by arbitration; (2) subsequent controversies related to the contract arising between the parties to the contract; and (3) a provision that a judgment of a Michigan Circuit Court may be rendered on an arbitrator's award. MCL 600.5001(1). Once these criteria are met, the arbitration agreement falls within the Michigan Arbitration Act and is "enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract." MCL 600.5001(2). Statutory arbitration is to be conducted in accordance with the rules of the Michigan Supreme Court. MCL 600.5021.

A common law arbitration agreement is any valid arbitration agreement that does not comply with the arbitration statute. *FJ Siller, supra* at 268.

MCR 2.116(C)(7) specifically states that an agreement to arbitrate is a valid bar to litigation. The Michigan Arbitration Act requires the enforcement of arbitration clauses in written contracts, stating: "A provision in a written contract to settle by arbitration…shall be valid, enforceable and irrevocable save upon such grounds as exist at law or equity for the rescission or revocation of any contract." MCL 600.5001(2).

B. Arbitration Agreements

Arbitration agreements are subject to the rules applicable to the construction of contracts. See *FJ Siller & Co v Hart,* 400 Mich 578, 581 (1977). A statutory arbitration agreement is irrevocable except by mutual consent. See *Hetrick v Friedman,* 237 Mich App 264 (1999). However, a common law arbitration agreement may be revoked. See *Hetrick, supra* at 268-269.

C. Waiver

A party may waive the right to arbitration, and each case must be decided on the basis of its individual facts. *North West Michigan Const, Inc v Stroud,* 185 Mich App 649, 651 (1990). However, waiver of a contractual right to arbitration is not favored. *Kauffman v Chicago Corp,* 187 Mich App 284, 291 (1991). A party arguing there has been a waiver of this right bears a heavy burden of proof. The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts. *Id.*; *Burns v Olde Discount Corp,* 212 Mich App 576, 582 (1995). The question of law whether the relevant circumstances establish a waiver of the right to arbitration is reviewed de novo and the trial court's factual determinations regarding the applicable circumstances is reviewed for clear error. *Madison District Public Schools v Myers,* 247 Mich App 583, 588 (2001).

D. Judicial Review and Enforcement

Upon the making of an agreement described in MCL 600.5001, the circuit courts have jurisdiction to enforce the agreement and to render judgment on an award thereunder. MCL 600.5025.

"[J]udicial review of an arbitrator's decision is limited; a court may not review an arbitrator's factual findings or decision on the merits." *Port Huron Area Sch District v PHEA,* 426 Mich 143, 150 (1986).

MCR 3.602 governs statutory arbitration under MCL 600.5001 through MCL 600.5035. A statutory arbitration award may be confirmed, modified, corrected, or vacated. "A reviewing court has three options when a party challenges an arbitration award: (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Krist v Krist,* 246 Mich App 59, 67 (2001). MCR 3.602(I) governs the confirmation of an award. Although MCR 3.602(J)(3) provides the trial court may order a rehearing, the rule does not provide that the trial court may return the case to an arbitrator for reconsideration. Nor may the court return the matter to the arbitrator for an expansion of the record. *Saveski v Tiseo Architects, Inc,* 261 Mich App 553, 558 (2004).

An arbitration award may be vacated if (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded granted powers; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. MCR 3.602(J)(1). *Dohanyos v Detrex Corp,* 217 Mich App 171, 174-175 (1996); *Collins v Blue Cross and Blue Shield of Michigan,* 228 Mich App 560, 567 (1998).

Whenever the jurisdiction of an arbitrator is questioned, it must be determined in order to make an award on arbitration binding. The existence of a contract to arbitrate and the enforceability of its terms is a judicial question which cannot be decided by an arbitrator. *Arrow Overall Supply Co v Peloquin Enterprises,* 414 Mich 95, 98-99 (1982).

The standard of review for determining whether arbitrators have exceeded the scope of their authority was set forth in *DAIIE v Gavin,* 416 Mich 407, 434 (1982), and more recently in *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 496-497 (1991). A reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agreed would constitute the record. Arbitrators have exceeded their powers whenever they act beyond the material terms of the arbitration agreement from which they primarily draw their authority, or in contravention of controlling principles of law. *Gavin, supra* at 428-429; *Gordon Sel-Way, supra* at 496.

E. Timing

The award must be confirmed within one year after the award is rendered. MCL 600.5021; MCR 3.602(I).

Attacks on the award must be brought within 21 days from delivery of a copy of the award to the applicant. If the attack is based on fraud, corruption or undue means, the attack must be brought within 21 days after such grounds are known or should have been known. MCR 3.602(J), (K).

F. Standard of Review

The requirements of the arbitration rule are mandatory with only a few exceptions. No case has been located giving a general standard of review under this court rule.

3.61 Class Action

MCR 3.501 Class actions

A. Generally

MCR 3.501(A)(1) provides that one or more members of a class may sue as representative parties if:

- the class is so numerous that joinder of all members is impracticable (numerosity);
- there are common questions of law or fact (commonality);

- the claims of the representative parties are typical of the class (typicality);
- the representative parties will fairly and adequately assert and protect the interest of the class (adequacy); and
- a class action is superior to other methods of adjudication (superiority).

All of the listed requirements must be met. *A & M Supply Co v Microsoft Corp,* 252 Mich App 580, 597 (2002). It is recommended that the trial court address all five factors in determining whether to grant or deny certification as a class action. *Salesin v State Farm Mutual Auto Ins Co,* 229 Mich App 346, 372 n 13 (1998).

"When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true. . . . The burden is on the plaintiff to show that the requirements for class certification exist." *Neal v James,* 252 Mich App 12, 15-16 (2002) (citations omitted).

A helpful analysis of the court rule factors is found in *A & M Supply Co v Microsoft Corp,* 252 Mich App 580, 597-602 (2002). The requirements of MCR 3.501 are quite specific and provide the steps that the court must follow.

B. Standard of Review

"[A] trial court's ruling regarding certification of a suit as a class action" is reviewed for clear error. *Salesin v State Farm,* 229 Mich App 346, 370 (1998). See also *Zine v Chrysler Corp,* 236 Mich App 261, 270 (1999).

3.62 Contracts

A. Elements

"The essential elements of a contract are: parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v City of Detroit*, 181 Mich App 121, 127 (1989); *Borg-Warner Acceptance Corp v Dep't of State*, 169 Mich App 587, 590 (1988); *Johnson v Douglas*, 281 Mich 247, 256 (1937).

B. Construction

"In determining contractual rights and obligations, a court must look to the intention of the parties, and a contract should always be construed so that it carries that intention into effect. When the words of a written contract are clear and unambiguous and have a definite meaning, the court has no right to

look to extrinsic evidence to determine their intent. Indeed, if the language of the entire contract is clear and unambiguous, there is no room for construction by the courts, and in such case, the language must be held to express the intention of the parties and the court need not search for meanings nor indulge in inferences as to the intention of the parties." *DeVries v Brydges*, 57 Mich App 36, 41 (1974).

"It is a fundamental principle of law that, if the language of a written contract is subject to two or more reasonable interpretations or is inconsistent on its face, the contract is ambiguous, and a factual development is necessary to determine the intent of the parties. It is also fundamental law that the language of a contract is to be construed against the drafter of the contract." *Petovello v Murray*, 139 Mich App 639, 642 (1984) (citations omitted).

Construing a contract against the drafter to resolve ambiguous contract language is applicable only if the intent of the parties cannot be discerned through the use of all conventional rules in interpretation, including an examination of relevant extrinsic evidence. *Klapp v United Ins Group Agency,* 468 Mich 459, 472 (2003).

C. Parol Evidence Rule and Statute of Frauds

The statute of frauds requires that certain types of agreements be in writing. The parol evidence rule precludes the introduction of evidence which would change an unambiguous written agreement.

1. Parol Evidence Rule

Oral (parol) evidence is not admissible to contradict or change an unambiguous written agreement. *Paul v University Motor Sales Co*, 283 Mich 587, 599 (1938). The parol evidence rule is a rule of substantive law as well as a rule of evidence. *Mid America Management Corp v Dep't of Treasury*, 153 Mich App 446, 459 (1986); *Salzman v Maldaver*, 315 Mich 403, 412 (1946). There are numerous qualifications and exceptions to the parol evidence rule. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492-493 (1998).

In *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 410-411 (1979), the Court, quoting *Goodwin, Inc v Orsen E Coe*, 392 Mich 195 (1974), held:

> "'A number of well-established exceptions to the parol evidence rule have been recognized, however, by Michigan courts. For example, the rule does not preclude admission of extrinsic evidence showing: that the writing was a sham, not intended to create legal relations, that the contract has no efficacy or effect because of fraud, illegality, or mistake, that the parties did not 'integrate' their agreement, or assent to it as the final embodiment of their understanding, or that the agreement was only 'partially

> integrated' because essential elements were not reduced to writing, ' ." [Citations omitted.]

In *Klapp v United Ins Group Agency,* 468 Mich 459, 474 (2003), the Supreme Court gave the following guidance:

> "[T]he jury can consider relevant extrinsic evidence as aid to interpreting a contract whose language is ambiguous. However, if, after the jury has applied all other conventional means of contract interpretation and considered the relevant extrinsic evidence, the jury is still unable to determine what the parties intended, the jury should then construe the ambiguity against the drafter. That is, the rule of contra proferentem is only to be applied if the intent of the parties cannot be discerned through the use of all conventional rules of interpretation, including an examination of relevant extrinsic evidence."

When the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete on its face. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502 (1998). Also see *Romska v Opper*, 234 Mich App 512, 516 (1999).

For a general discussion of the parol evidence rule and the exceptions, see Harry M. Philo, Trial Handbook for Michigan Lawyers, Ch 32, Lawyers Cooperative Publishing (3d ed 1995).

2. Statute of Frauds

Certain types of agreements are required to be in writing. The general statute of frauds is found at MCL 566.132. Also see MCL 566.106 et seq., which generally requires that no interest in real estate can be created or transferred, other than lease not exceeding one year, unless it is in writing and signed by the person creating or transferring the interest.

Partial performance of an agreement is sufficient to remove it from the statute of frauds. *Giordano v Markowitz*, 209 Mich App 676, 679 (1995).

For a summary and discussion of judicially created exceptions to the statute of frauds, see *Kelly-Stehney v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 612-615 (2002).

D. Damages

"The goal in awarding damages for breach of contract is to give the innocent party the benefit of his bargain -- to place him in a position equivalent to that which he would have attained had the contract been performed. The injured party, however, must make every reasonable effort to minimize the loss

suffered, and the damages must be reduced by any benefits accruing to the plaintiff as a consequence of the breach. In other words, under the avoidable consequences doctrine, the plaintiff is not allowed to recover for losses he could have avoided by reasonable effort or expenditure. He has a duty to do whatever may reasonably be done to minimize his loss. Closely related to the avoidable consequences rule is the requirement that any benefit to the plaintiff arising from or as a result of the breach must reduce the damages otherwise payable." *Tel-Ex Plaza v Hardees Restaurants, Inc*, 76 Mich App 131, 134-135 (1977).

E. Failure to Read Contract

It is presumed that one who signs a contract has read and understands it. *McKinstry v Valley OB-GYN*, 428 Mich 167, 184 (1987). Failure to read a contract is not grounds for relief absent fraud, artifice or deception. *Moffit v Sederlund*, 145 Mich App 1, 8 (1985). It is not a defense that the party did not read the contract. *DeValerio v Vic Tanny Int'l*, 140 Mich App 176, 179-180 (1984).

F. Release

"Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. MCR 2.116(C)(7). A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release." *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201 (1988)(citations omitted).

*See also Section 3.35 on settlements.

If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become "subjective, and irrelevant," and the legal effect of the language is a question of law to be resolved summarily. *Gortney v Norfolk & W R Co*, 216 Mich App 535, 540-541 (1996) (citations omitted).*

G. Third Party Beneficiary

See MCL 600.1405.

H. Standard of Review

Where contractual language is clear, its construction is a question of law and is therefore reviewed de novo. *Pakideh v Franklin Mortgage*, 213 Mich App 636, 640 (1995). See also *Morley v Auto Club of Michigan*, 458 Mich 459, 465 (1998).

3.63 Declaratory Judgments

MCR 2.605 Declaratory judgments

MCR 2.111(B)(2) Statement of claim

A. Court's Power to Enter Declaratory Judgment

Any Michigan court of record may entertain a declaratory judgment action. MCR 2.605(A)(1). Note that the court rule language is permissive. Circuit, District and Probate Courts have jurisdiction in any case in which they would have jurisdiction if other relief was sought. MCR 2.605(A)(2). Whether to grant declaratory relief is ordinarily discretionary. *Allstate Ins Co v Hayes*, 442 Mich 56, 74 (1993).

B. Actual Controversy Required

There must be an actual controversy which causes a party to seek a declaration of rights or legal relationships. MCR 2.605(A)(1) and MCR 2.111(B)(2); *Shavers v Attorney General*, 402 Mich 554, 588-89 (1978). See also *Michigan State AFL-CIO v Civil Service Comm'n*, 191 Mich App 535, 545 (1991). However, to make courts accessible to interested parties, the rule is to be liberally construed. *Kalamazoo Police Supervisors Ass'n v City of Kalamazoo*, 130 Mich App 513, 517 (1983); *Recall Committee v Sec'y of State*, 146 Mich App 117, 121 (1985).

To establish an actual controversy, it is essential for the plaintiff to plead and prove facts indicating an adverse interest which necessitates sharpening of the issues raised. *Crawford County v Sec'y of State*, 160 Mich App 88, 93 (1987).

"In general, an actual controversy exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Michigan State AFL-CIO, supra.*

C. Expedited Hearing

If declaratory relief is the only relief sought, the court may order an expedited hearing. MCR 2.605(D).

D. Other Relief

Once a declaratory judgment has determined the rights of the parties, any appropriate relief may be granted, including monetary damages. MCR 2.605(F). See also *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90 (1995); *Foremost Life Ins Co v Walters*, 125 Mich App 799, 802 (1983).

E. Standard of Review

A declaratory judgment is reviewed de novo. *Attorney General v Cheboygan Road Comm'rs*, 217 Mich App 83, 86 (1996).

3.64 Equity

Const 1963, art 6, § 5

MCL 600.601 Circuit courts; jurisdiction

A. Generally

The court is given broad discretionary powers to consider remedies which are necessary, fair and workable. *Youngs v West*, 317 Mich 538, 545 (1947). The court, when granting equitable relief, may fashion a remedy warranted by the circumstances. The remedy must be specific and enforceable or will not be granted. *Three Lakes Ass'n v Kessler*, 91 Mich App 371, 377-378 (1979).

The court has broad discretionary powers regarding equity none of which are to be used to enlarge rights which a statute grants and which exceptions are provided. *Dumas v Helm*, 15 Mich App 148, 152 (1968). The court is not deprived jurisdiction due to the mere existence of a law unless the law is clear, complete and would serve justice as efficiently as the remedy of equity. *Walker v Walker,* 330 Mich 332, 336 (1951).

Equity is primarily granted with concern to property rights. Sound discretion of the court is the controlling guide in every suit of equity. It is up to the court to consider the circumstances of each particular case to determine if equity will be granted. *Youngs v West*, 317 Mich 538, 545 (1947).

B. Jury Trial?

"There is no right to a jury trial where the relief sought is solely equitable in nature." *Thomas v Steuernol*, 185 Mich App 148, 155-156 (1990). See also *Anzaldua v Band*, 216 Mich App 561, 573 (1996). However, MCR 2.509(D) permits equitable claims to be decided by a jury with the consent of the parties. *McPeak v McPeak*, 457 Mich 311, 315 (1998).

C. Clean Hands

A party seeking equity must come with clean hands. *Rose v National Auction Group*, 466 Mich 453, 462 (2002).

D. Laches

"The application of the doctrine of laches requires a passage of time combined with a change in condition which would make it inequitable to enforce the claim against the defendant. In determining whether a party is guilty of laches, each case much be determined on its own particular facts." *Sedger v Kinnco, Inc*, 177 Mich App 69, 73 (1988) (citations omitted). In order to assert the equitable defense of laches, the defendant must have clean hands. *Attorney General v Thomas Solvent Co,* 146 Mich App 55, 66 (1985).

MCL 600.5815 provides the statute of limitations applies to equitable actions, but also provides "[t]he equitable doctrine of Laches shall also apply in actions where equitable relief is sought." *Attorney General v Harkins,* 257 Mich App 564, 571-572 (2003). A recent unpublished decision concluded this means Laches can shorten but not extend the limitations period. *Petersen v Obert,* No. 244304 (May 6, 2004).

E. Standard of Review

"When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered. A trial court's findings are considered clearly erroneous where we are left with a definite and firm conviction that a mistake has been made." *Webb v Smith*, 204 Mich App 564, 568 (1994) (citations omitted).

"We review equity cases de novo, but will not reverse a trial court's decision unless that court's findings are clearly erroneous or we are convinced that we would have reached a different result if we had occupied the trial court's position." *VanDeventer v Michigan National Bank*, 172 Mich App 456, 461 (1988).

3.65 Injunctive Relief

MCR 3.310 Injunctions

A. Injunctive Options

Temporary restraining orders, which may be granted without notice and without hearing, MCR 3.310(B);

Preliminary injunctions, which ordinarily can only be entered after a hearing, MCR 3.310(A); and,

Injunctions, MCR 3.310(C).

B. Temporary Restraining Order (TRO)

There are 3 requirements that must be met for a TRO to be granted without notice:

1) it clearly appears from specific facts shown by affidavit or verified complaint that imminent and irreparable injury, loss, or damage will result from the delay required to effect notice or that notice itself will precipitate adverse action before an order can be issued;

2) the applicant's attorney certifies to the court in writing the efforts that have been made to give notice and the reasons why notice should not be required; and

3) a permanent record is made of any nonwritten evidence, argument, or other representations made in support of the application. MCR 3.310(B)(1).

A TRO granted without notice must:

1) be endorsed with the date and time of issuance;

2) describe the injury and state why it is irreparable and why the order was granted without notice; and

3) except in domestic relations actions, set a date for hearing at the earliest possible time on the motion for a preliminary injunction or order to show cause why a preliminary injunction should not be issued. MCR 3.310(B)(2).

A helpful discussion is found in *Acorn Inc v UAW Local 2194*, 164 Mich App 358, 363-366 (1987). Generally, the court rule suggests that a temporary restraining order should be granted only in an extraordinary situation based upon a specific showing of need.

"In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical. Economic injuries are not irreparable because they can be remedied by damages at law." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998) (citations omitted).

C. Preliminary Injunction

The moving party has the burden of establishing that a preliminary injunction should issue. MCR 3.310(A)(4).

A preliminary injunction maintains the status quo to allow the Court to adjudicate the parties' rights without further injury. *Bratton v DAIIE*, 120

Mich App 73, 79 (1982). The grant or denial of a preliminary injunction is within the Court's discretion. *Id.* The Court should consider four factors in determining whether a preliminary injunction should issue:

1) whether the plaintiff is likely to succeed on the merits;

2) whether plaintiff will be irreparably harmed if a preliminary injunction is denied;

3) whether the harm to the plaintiff in the absence of a stay would outweigh the harm to defendants if the stay is granted; and

4) whether the injunction would harm the public interest.

Michigan State Employees Ass'n v Dep't of Mental Health, 421 Mich 152, 157-158 (1984); *City of Detroit v Salaried Physicians*, 165 Mich App 142, 150-151 (1987); *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 60-61 (1985).

The "four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co*, 755 F2d 1223, 1229 (CA 6, 1985). This concept was explained in *Metropolitan Detroit Plumbing & Mechanical Contractors Ass'n v Dep't of HEW*, 418 F Supp 585, 586 (ED Mich 1976), when the Court stated:

> "This apparent disparity in the wording of the standard merely reflects the circumstances that no single factor is determinative as to the appropriateness of equitable relief. In addition to assessing the likelihood of success on the merits, the Court must consider the irreparability of any harm to the plaintiff, the balance of injury as between the parties, and the impact of the ruling on the public interest. In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction."

A preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits, nor should it be issued where the party seeking it has an adequate remedy of law. *Psychological Services of Bloomfield, Inc v Blue Cross and Blue Shield of Michigan*, 144 Mich App 182, 185 (1985).

As stated above the granting or denying of a preliminary injunction rests with the sound discretion of the court. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 462 (1988).

The standards applicable to a review of a preliminary injunction were concisely stated in *Bratton v DAIIE*, 120 Mich App 73, 79 (1982):

> "The grant or denial of a preliminary injunction is within the sound discretion of the trial court. The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either. The status quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. The injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. Furthermore, a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits. Finally, a preliminary injunction should not be issued where the party seeking it has an adequate remedy at law." (Citations Omitted).

If a preliminary injunction is granted, the trial of the action on the merits must be held within 6 months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period. MCR 3.310(A)(5).

Valid real estate restrictions are generally enforceable by injunction. *Webb v Smith,* 224 Mich App 203, 211 (1997).

D. Injunction

Every injunctive order should state why it was issued and be quite specific as to its terms. Remember MCR 2.517 regarding findings. Reference cannot be made to any other document to describe the acts restrained. Generally, see MCR 3.310(C). There is little case law involving this court rule.

E. Standard of Review

The grant of denial of injunctive relief is reviewed for an abuse of discretion. *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 534 (2000); *Campau v McMath*, 185 Mich App 724, 729 (1990).

3.66 Interpleader

MCR 3.603 Interpleader

A. Availability—MCR 3.603(A)

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not a ground for objection to the joinder that the claims of the several claimants do not have a common origin or are not identical. MCR 3.603(A)(1).

B. Timing

A defendant exposed to liability may obtain interpleader by counter-claim or cross-claim. A claimant not already before the court may be joined as a defendant, as provided in MCR 2.207 or MCR 2.209. MCR 3.603(A)(2).

C. Costs

A common law exception exists allowing the recovery of attorney fees by interpleader plaintiffs. *Star Transfer Line v General Exporting Co,* 308 Mich 86 (1944); *GRP Ltd v United States Aviation Underwriters, Inc,* 70 Mich App 671 (1976); *Terra Energy, Ltd v Michigan,* 241 Mich App 393 (2000).

D. Standard of Review

No case stating the standard of review has been located. However, the language of the court rule is discretionary and the Michigan Supreme Court has suggested in *Marsh v Foremost Ins Co,* 451 Mich 62, 72 (1996), that a trial court's decision should be reviewed for an abuse of discretion.

3.67 Mandamus

Const 1963, art 6, § 13

MCL 600.4401 et seq. Mandamus

MCR 3.305 Mandamus

A. Purpose

A writ of mandamus directs a public official to do his or her duty. Mandamus will lie to compel the exercise of discretion but not to compel its exercise in a particular manner. *Teasel v Dep't of Mental Health,* 419 Mich 390, 410 (1984).

B. Issuance

Issuance of a writ of mandamus is proper where "(1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment." *McKeighan v Grass Lake Supervisor*, 234 Mich App 194, 211-212 (1999), overruled on other grounds 464 Mich 1 (2001). "A writ of mandamus will only be issued if the plaintiffs prove they have a 'clear legal right to performance of the specific duty sought to be compelled' and that the defendant has a 'clear legal duty to

perform such act….'" *In re MCI Telecommunications Complaint*, 460 Mich 396, 442-443 (1999).

C. Standard of Review

The decision to grant or deny a writ of mandamus is reviewed for an abuse of discretion. *In re MCI Telecommunications Complaint*, 460 Mich 396, 443 (1999); *McKeighan v Grass Lake Supervisor*, 234 Mich App 194, 211 (1999); *Garner v MSU*, 185 Mich App 750, 757 (1990).

3.68 Superintending Control

MCR 3.302 Superintending control

A. Purpose

A superintending control order enforces the supervisory power of a court over lower courts or tribunals. MCR 3.302(A).

B. Extraordinary Remedy

Superintending control is an extraordinary remedy. If another adequate remedy is available to the party seeking the order, an order for superintending control is precluded. MCR 3.302(B); *Cahill v Fifteenth District Judge*, 393 Mich 137, 141 (1974); *East Jordan Iron Works v WCAB*, 124 Mich App 324, 330-332 (1983); *In re Gosnell*, 234 Mich App 326, 341-342 (1999).

Availability of an appeal, even an interlocutory appeal, or another remedy will defeat a writ of superintending control. *Moore v Ninth District Judge*, 69 Mich App 16, 18-19 (1976); *Choe v Charter Twp of Flint*, 240 Mich App 662, 667 (2000); MCR 3.302(D)(2).

If appeal is available, but not adequate, then superintending control is not precluded. *Cahill, supra* and *In re Hague,* 412 Mich 532, 546 (1982).

If a party does not have standing to appeal, superintending control may be a proper remedy. *In re 33rd District Court*, 138 Mich App 390, 394 (1984).

C. Validity

A superintending control order entered by a court with proper jurisdiction must be obeyed even if clearly incorrect. *In re Hague*, 412 Mich 532, 545 (1982).

D. Limitations

Superintending control may not be used to permanently remove a judge. *In re Probert*, 411 Mich 210, 230 (1981); *In re Callahan*, 419 Mich 376, 388 (1984).

E. Parties

Although a judge may be a nominal defendant in a case seeking an order of superintending control, the judge is not an aggrieved party, and thus has no standing to appeal an order of superintending control. *Wayne County Pros v Recorder's Court Judge*, 66 Mich App 315, 316 (1975).

F. Standard of Review

"The grant or denial of a petition for superintending control is within the sound discretion of the court. Absent an abuse of discretion, the [appeals court] will not disturb the denial of a request for an order of superintending control." *In re Goehring*, 184 Mich App 360, 366 (1990).